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MASSACHUSETTS REPORTS

154

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

MAY 1891 — NOVEMBER 1891

WILLIAM V. KELLEN

REPORTER

BOSTON

LITTLE, BROWN, AND COMPANY

1892

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. WALBRIDGE A. FIELD, CHIEF JUSTICE.
HON. WILLIAM ALLEN.
(DIED, JUNE 4, 1891.)
HON. CHARLES ALLEN.
HON. OLIVER WENDELL HOLMES, JR.
HON. MARCUS P. KNOWLTON.
HON. JAMES M. MORTON.
HON. JOHN LATHROP.
HON. JAMES M. BARKER.
(APPOINTED, JUNE 18, 1891.)

ATTORNEY GENERAL.

HON. ALBERT E. PILLSBURY.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

WILLIAM H. ZINN *vs.* WILBUR P. RICE.

Suffolk. November 13, 1890. — May 20, 1891.

Present: FIELD, C. J., W. ALLEN, HOLMES, & MORTON, JJ.

Excessive Attachment — Abuse of Process — Commencement of Action.

An action for maliciously making an excessive attachment of property, not for the purpose of securing a debt, but for the purpose of injuring the debtor, may be brought before the termination of the original action in which the attachment was made.

TORT, to recover damages for alleged wrongful acts of the defendant, in that, in an action of contract brought by him against the plaintiff to recover the sum of $4,522.45, he maliciously placed the *ad damnum* in the writ at $40,000, and maliciously caused to be made various attachments, each in the sum last named, upon the real and personal property of the plaintiff, to his great damage.

At the trial in the Superior Court, before *Lathrop*, J., the plaintiff offered to prove that the defendant on February 7, 1889, sued out a writ in an action of contract, in which the damages were laid at $40,000; that on February 9 two successive attachments, each in the sum of $40,000, were, under the defendant's

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instructions, placed on the plaintiff's real estate, which was worth many times the amount owed to the defendant by the plaintiff; that on February 12, 1889, the defendant caused an attachment in the same sum to be placed upon the plaintiff's stock of goods and merchandise, valued at about $100,000, situated in his stores in Boston, and a keeper was put over the same who remained there for two days; that at this time the plaintiff was, as the defendant knew, absent from the Commonwealth for the benefit of his health; that subsequently, in the absence of the plaintiff and upon the statement of his counsel, an order was obtained in the Superior Court reducing the *ad damnum* in the writ to $10,000; that the defendant did what he did maliciously, and for the avowed purpose of injuring the plaintiff; and that by these acts of the defendant the plaintiff had been greatly damaged. It also appeared that the original action in which the attachments were made had not been terminated when the present action was brought, but was still pending before an auditor.

The judge ruled that the present action was prematurely brought, and ordered a nonsuit to be entered; and the plaintiff alleged exceptions.

B. L. M. Tower, for the plaintiff.

R. M. Morse, Jr., for the defendant.

1. The same principles of law apply to an action to recover damages for excessive attachment as apply to an action for malicious arrest. In *Lindsay* v. *Larned*, 17 Mass. 190, an action on the case to recover damages for an attachment made in a suit on several promissory notes, it was held that the case was similar to the ordinary case of malicious prosecution. In *Savage* v. *Brewer*, 16 Pick. 453, an action for malicious prosecution, where property was attached to the value of $1,500 to secure a debt of $120, Wilde, J., after stating the law in respect to malicious arrest, said (p. 457): "It seems to us, that the same reason and principle applies to the taking of personal property, under our process of attachment, where the amount of property attached is manifestly excessive." In discussing the law of malicious prosecution, in *Cardival* v. *Smith*, 109 Mass. 158, Gray, J. said: "When the suit complained of is a civil action, wholly under the control of the plaintiff therein, it would seem that a discharge thereof by him, without any judgment or verdict, is a sufficient termination of

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the suit; and that, for instance, if one maliciously causes another to be arrested and held to bail for a sum not due, or for more than is due, knowing that there is no probable cause, and, after entering his action, becomes nonsuit, or settles the case upon receiving part of the sum demanded, an action for a malicious prosecution may be maintained against him." See also *Rossiter* v. *Minnesota Bradner-Smith Paper Co.* 37 Minn. 296; *Newark Coal Co.* v. *Upson*, 40 Ohio St. 17.

2. To recover in an action for malicious prosecution, there must first have been a termination of the action sued upon. *Bicknell* v. *Dorion*, 16 Pick. 478. *O'Brien* v. *Barry*, 106 Mass. 300. *Cardival* v. *Smith*, 109 Mass. 158. *Hamilburgh* v. *Shepard*, 119 Mass. 30. *Ripley* v. *McBarron*, 125 Mass. 272. A reduction of the amount of the attachment in accordance with the provisions of the Pub. Sts. c. 161, § 121, is not a termination of the former action such as to give a right of action for malicious prosecution. It does not determine the rights of the parties, any more than the increase of the *ad damnum* in a writ, or the issuing of a special precept for an increased attachment, determines the rights of the plaintiff. *Non constat* that at some time before final judgment the plaintiff might not amend his declaration, and insert an additional claim sufficient to justify the attachment.

3. Actions for excessive attachment have been sustained, although no allegation was made of the termination of the original action in favor of the plaintiff, and where in fact that action had not been terminated. But the attachment in these cases generally was of personal property of which the owner had been deprived, and in every case the decision was upon the ground that the action was for abuse of legal process, and not for malicious prosecution. The action in the case at bar is not an action for abuse of legal process. See *Johnson* v. *Reed*, 136 Mass. 421.

W. ALLEN, J. It is not contended that the facts alleged in the declaration and offered to be proved at the trial are not sufficient to sustain an action by the plaintiff against the defendant. The defendant's contention is, that the action is prematurely brought; that it is an action for malicious prosecution, and subject to the rule that a suit for malicious prosecution cannot be maintained until the prosecution has terminated in favor of the plaintiff. But the rule applies only to suits for maliciously

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instituting groundless prosecutions, and does not apply to the injurious and malicious use of process in proceedings which were commenced with probable cause. The latter, being for the malicious use of legal process by acts authorized by its terms, may be called actions for malicious prosecution, to distinguish them from actions for the abuse of process by doing, under color of legal process, acts not authorized by it; but there is no rule of law that in such an action the termination of any former suit must be shown. The rule is founded on the necessity of proving that a prosecution which itself puts in issue the truth of the charge on which it is founded is without probable cause. A defendant in such an action cannot bring another action to try the issue tendered him in the first, while that issue is pending. The rule is by its terms and nature limited to a prosecution to establish a charge or cause of action, and cannot include an *ex parte* use of process incidental and collateral to such a prosecution, and in defence to which falsity of the charge cannot be shown. *Parker* v. *Langly*, 10 Mod. 209. *Fortman* v. *Rottier*, 8 Ohio St. 548. *Bump* v. *Betts*, 19 Wend. 421. *Barnett* v. *Reed*, 51 Penn. St. 190. *Jennings* v. *Florence*, 2 C. B. (N. S.) 467. *Churchill* v. *Siggers*, 3 El. & Bl. 929. *Wentworth* v. *Bullen*, 9 B. & C. 840. *Savage* v. *Brewer*, 16 Pick. 453. *Bicknell* v. *Dorion*, 16 Pick. 478. *Wood* v. *Graves*, 144 Mass. 365. *Everett* v. *Henderson*, 146 Mass. 89.

In the case at bar the grievance of the plaintiff is not that the defendant maliciously commenced a groundless suit. He admits that the defendant had a good cause of action, and that there is no defence to the suit, and that its termination cannot be in his favor. Nor is his grievance that the defendant abused the process in the former suit, and under color of it did things not authorized by its terms. His grievance is that the defendant, having a just cause of action and a legal suit against this plaintiff, made an excessive attachment of property which he knew was not needed for the security of his debt, not for the purpose of securing his debt, but for the purpose of injuring the plaintiff. If the plaintiff has any right of action, which is not controverted, it is idle to say that he must wait until the former action has terminated in his favor.

The defendant contends that the amount of the debt must be

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fixed by the determination of the former suit, and that it cannot be shown in this suit. We know of no authority or reason for this. The amount of the debt cannot exceed the amount declared for in the suit, and that is admitted to be due so far certainly as affects this suit. Beyond that there is no question in the former suit, and no issue, and the proceedings complained of were *ex parte*, and they were terminated by the reduction of the attachment. It is argued that the plaintiff in that suit may amend his declaration, and introduce a new cause of action. That case, as stated by the plaintiff himself, does not present any issue involved in the case at bar, and the possibility that a new cause of action may be added, if it existed, would not be sufficient to show that the issues presented in this case are pending in that, or to bring it within the terms or reason of the rule that the liability of this plaintiff to such possible cause of action can be tried only in that action. *Exceptions sustained.*

KNITTED MATTRESS COMPANY *vs.* CHARLES A. GRIGGS & another.

Suffolk. November 17, 1890. — May 20, 1891.

Present: FIELD, C. J., W. ALLEN, HOLMES, & MORTON, JJ.

Goods sold — Delivery — Recoupment.

In an action for goods sold and delivered, the defendants cannot recoup damages sustained by them arising from the breach of a prior agreement by the plaintiff to constitute them selling agents of a line of goods similar to those in question, and to give them "the privilege of purchasing goods on their own account at net prices less their commission of the above mentioned line of goods."

CONTRACT, for the price of goods sold and delivered by the plaintiff to the defendant. The answer contained a general denial, and alleged, in addition, that by an agreement in writing between the parties the defendants were to be selling agents for the plaintiff for certain goods manufactured by it, and at prices fixed by it, and were "to have the privilege of purchasing goods on their own account at net prices less their commission of the

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above mentioned line of goods," and the plaintiff was to pay the defendants commissions monthly on such purchases and sales; that the plaintiff broke this agreement by refusing to fill contracts made by the defendants, and to pay them their commissions, and to allow them to purchase goods on their own account; that subsequently an oral agreement was made between the parties, by which the goods were to conform in quality and weight to certain samples, and to be sold at a certain price; and that the defendants advertised the goods as conforming to the samples at a price based upon the price agreed upon with the plaintiff, and the plaintiff increased that price and reduced the weight and quality, because of which customers refused to take the goods. The defendants also filed a declaration in set-off.

Trial in the Superior Court, before *Blodgett*, J., who, after a verdict for the plaintiff, reported the case for the determination of this court, in substance as follows.

The defendants admitted the sale and delivery of the goods specified in the declaration at the prices therein mentioned, and that there was no defect in the quality of any of the goods so sold, and also admitted that they were not entitled to maintain their declaration in set-off. The goods sold were goods which the defendants were entitled to buy, and the plaintiff was bound to sell, under one of the provisions of the contract between the parties set out in the answer. The judge ruled that none of the matters alleged in the defendant's answer, other than those waived by the admission as before stated, would constitute, if proved, a defence to this action, or would entitle the defendants to any reduction of the damages claimed by the plaintiff; to which ruling the defendants excepted.

If the ruling was right, judgment was to be entered on the verdict; otherwise, the verdict was to be set aside and a new trial granted.

T. E. Grover, for the defendants.

J. L. Thorndike, (*Sherman Hoar* with him,) for the plaintiff.

W. ALLEN, J. The contracts of sale upon which the plaintiff declares are distinct from the contracts set up in the answer of the defendants. The answer alleges no breach of any contract on which the plaintiff sues, and no right of the defendants to damages on account of such contracts. The provision in the

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contract set up in the answer, that the defendants are "to have the privilege of purchasing goods on their own account at net prices less their commission of the above mentioned line of goods," does not make sales subsequently made by the plaintiff to the defendants part of the contract, so that the defendants can recoup damages arising from the breach of the contract which have no connection with the sales against the price of goods so sold. The transactions are distinct, and the fact that by one transaction the plaintiff came under obligation to enter into the other does not make them the same. *Harrington* v. *Stratton*, 22 Pick. 510. *Sawyer* v. *Wiswell*, 9 Allen, 39. *Carey* v. *Guillow*, 105 Mass. 18. *Brighton Five Cents Savings Bank* v. *Sawyer*, 132 Mass. 185. *Judgment on the verdict.*

ABBY S. T. HOVEY *vs.* GEORGE A. DARY & another.

Suffolk. November 19, 1890. — May 20, 1891.

Present: FIELD, C. J., W. ALLEN, C. ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Devise in Trust — Sale of Land by Trustee — Proceeds as Real Estate.

If a trustee under a will sells land, under a power of sale contained therein, the fund resulting therefrom takes the place of the land which yielded it, and, unless it appears that it was the intention of the testator that it should be converted into and remain personal estate, is to be treated as real estate until it reaches one who, if it had remained real estate, would take it to his own use absolutely, or with a power to make it his own for all purposes.

A testator by his will gave one ninth of the residue of his estate to trustees, directing them to pay the income thereof to his daughter for her life, and, upon her death leaving issue, to "convey to such issue, their heirs and assigns forever," equally, the share of which "the parent received the income." The executors were empowered to sell any or all the real estate, "the proceeds of such sales to be held and accounted for by said executors in lieu and instead of such real estate"; and the trustees, after the transfer of the property to them, were given "the same power of sale hereinbefore given and granted to my said executors, . . . provided, however, my said trustees are to hold the proceeds of such real estate as they may make sale of for the same uses and purposes, and none other, as the real estate so sold should have been held for." During the daughter's lifetime one of her sons, who survived her with other issue, conveyed by deed his interest in this ninth, and subsequently the trustees sold the land, part of it before the death of the grantee intestate. *Held*, that the proceeds of the sales

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were to be treated by the trustees as real estate; and that the son's share thereof was to be paid to the heir at law of the grantee, and not to the latter's administratrix.

BILL IN EQUITY to compel George A. Dary, trustee under the will of Miriam W. Stedman, to pay over to Abby S. T. Hovey, administratrix of the estate of Charles A. Hovey, one quarter of one ninth of the residue of the estate of Mrs. Stedman. The case was heard by *Holmes*, J., who reported it for the consideration of the full court, in substance as follows.

The other defendant, who was joined by order of the court, is Miriam P. Adams, the daughter and heir at law of Charles A. Hovey. Mrs. Stedman by her will appointed her husband and two sons executors, and among other things gave six ninths of the residue of her estate to trustees, in trust to pay the income of one ninth to her son, Josiah Stedman, Jr., and the income of each of the other five ninths to each of her five daughters, one of whom was Miriam W. Priest, during their respective lives, and "in trust further, upon the decease of my said son Josiah Stedman, Jr., and of my said daughters as the same shall happen in the order of Providence, leaving issue, then to grant, surrender, and convey to such issue, their heirs and assigns forever, the said share or sixth part of which the parent received the income as aforesaid, to be equally divided among such issue, share and share alike; but in the event of the decease of my said son Josiah Stedman, Jr., or either of my aforesaid daughters, without leaving issue, then the share of said trust property, with all accumulation thereon, so devised for the use of such son and daughter so dying without issue, shall be held by my trustees aforesaid, for the use of my surviving sons or daughters, to be equally divided among them, and the shares devised in trust are to be held upon the like trusts and purposes herein already before declared and finally to be conveyed, divided, and distributed among their issue as hereinbefore provided; and in order to facilitate the settlement of my estate I do hereby authorize and empower my said executors hereinafter named, or such of them as shall accept the trusts, to grant, sell, alien, or convey any part or the whole of the real estate of which I shall or may die seised or possessed, at and for such prices or sums of money as he or they may think proper, with full power to sign, seal,

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acknowledge, and deliver any deed or deeds which counsel learned in the law may judge necessary and proper to convey a complete and perfect title in fee simple to such real estate; the proceeds of such sales to be held and accounted for by my said executors in lieu and instead of such real estate, but without any obligation on the part of the purchaser or purchasers to see to the application of the purchase money, any law or usage to the contrary notwithstanding, and all this without any application to any court or courts for such license; and moreover, from and after the time of the transfer of my estate into the hands and custody of my said trustees, as in my said will is contemplated, I do give and grant to my said trustees the same power of sale hereinbefore given and granted to my said executors, authorizing my said trustees from time to time to convert real estate into personal and personal estate into real estate as convenience may require, provided however my said trustees are to hold the proceeds of such real estate as they may make sale of for the same uses and purposes, and none other, as the real estate so sold should have been held for."

In 1867, after the death of the testatrix, Josiah S. Priest, one of the sons of Miriam W. Priest, and two other sons of hers who did not survive her, conveyed by deed, in consideration of one thousand dollars, their interest under the will to Charles A. Hovey. The defendant trustee, acting under the power given by the will, and by direction of the Probate Court, sold most of the real estate, consisting of four separate parcels, for $31,300, two of them being sold in 1883 and 1885 respectively, and the remaining two in 1888. Hovey married a second time, and died on June 19, 1886, intestate, leaving a daughter, Miriam P. Adams, and a wife, the plaintiff. Mrs. Priest died on May 31, 1888, leaving issue, including Josiah S. Priest. It was agreed that, as things turned out, the deed to Hovey operated to convey one quarter of the ninth of which Mrs. Priest had enjoyed the income. The defendant, acting under a decree of the Probate Court made on November 12, 1888, paid over to Miriam P. Adams one quarter of the one ninth of the proceeds of the real estate sold by him. The only question considered was whether, as between the defendant trustee and the administratrix and the heir at law of Hovey, the proceeds of the sales made by the trustee were real or personal estate.

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If the defendant was protected by this decree, or if the proceeds were to be treated as real estate, the bill was to be dismissed; otherwise, a decree was to be entered for the plaintiff.

The case was argued at the bar in November, 1890, and afterwards, in February, 1891, was submitted on the briefs to all the judges.

H. Dunham, for the plaintiff.

A. E. Denison & J. M. Lesser (of California), for the defendants.

By the Court. By the will of Mrs. Miriam W. Stedman she devised one ninth part of the residue of her estate to trustees, upon the trust to pay the income thereof for life to her daughter, Mrs. Miriam W. Priest, and upon the further trust that, if Mrs. Priest should decease leaving issue, then "to grant, surrender, and convey to such issue, their heirs and assigns forever," the share of which "the parent received the income as aforesaid, to be equally divided among such issue, share and share alike." Mrs. Priest deceased on May 31, 1888, leaving issue, and before her death three of her children conveyed to Charles A. Hovey, the plaintiff's intestate, their interest in the estate of which their mother had the income, by a deed which operated, as it is agreed, to convey one quarter of this ninth. Hovey died on June 19, 1886, leaving a daughter, Mrs. Miriam P. Adams, who was his sole heir at law. He had also been married for the second time, and left a widow, who is the administratrix bringing this bill.

The fourth of the ninth part which had belonged to Hovey has been paid over to the defendant, Mrs. Adams, under a decree of the Probate Court, which she sets up as conclusive of her right to it, and which the plaintiff claims is invalid. As we think that Mrs. Adams, as the heir of Hovey, is entitled to the money as real estate, and that the plaintiff as his administratrix has no right to it, we do not find it necessary to consider the character or effect of the decree of the Probate Court.

Where executors or trustees are directed to convert real estate into personal, it will more readily be inferred that the proceeds of such realty are to be held as personal property than where power and authority merely are conferred upon the executor thus to change investments. In the former case, the direction shows, or tends to show, that the testator has contemplated and understands the change that may be made in the rights of vari-

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ous parties by the change in the form of the property, while in the latter case it is less easy to suppose that he has confided to another the right and power to determine at his own discretion whether the descent or devolution of the property shall be changed by the new form which the property may assume by reason of the sale. That money derived from the sale of real estate will retain the character of real estate, and be subjected to the incidental rights which attend property in that form, will not be doubted, if such has been the clearly expressed intention of the party authorizing the conversion. Where leave is given under the statute to an executor or administrator to sell real estate for the payment of debts, if there be a surplus, it is considered real estate, to descend and to be disposed of as if it were actually so. Pub. Sts. c. 142, § 9.

In determining what were the rights of Hovey, or those acquired under him, it will be advisable first to inquire whether, if his grantor, Josiah S. Priest, who was one of the sons of Miriam W. Priest, had not conveyed his interest under the will, he would have taken the amount of the fourth of the ninth as realty. It is to be observed that the will contains no direction to turn the real estate into money, but a power only, and the power given to the trustees is apparently for convenient management merely. The executors or trustees might sell the whole, or any part of it, but it is not readily admissible that the testatrix intended that either should thus be invested with any authority to change the rights of those beneficially entitled thereto. After authorizing the executors to convey any portion of the realty, the testatrix adds, "the proceeds of such sales to be held and accounted for by my said executors in lieu and instead of such real estate." After the transfer of the property to trustees, the same authority to convert real estate into personal is conferred upon them, and then follows the proviso already quoted, by which the proceeds of the real estate, so far as the trustees exercise their power to make sale thereof, are to be held "for the same uses and purposes, and none other, as the real estate so sold should have been held for." The object of this language is to guard against any inference that by the change into personalty the property sold is to lose the character of realty, or that its descent or disposition is to be in any way altered, or any change made in the ben-

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eficiaries or their proportions. In *Holland* v. *Cruft*, 3 Gray, 162, it was held that, where real estate, specifically devised by a will which authorizes the executor or administrator to sell any of the testator's real estate and reinvest the proceeds in personal estate, but does not manifest any intent thereby to alter the disposition of the property, is legally converted into personalty, the proceeds are to go to the same persons, and in the same proportions, as if it had remained real estate. When land is converted into money, as by a trustee with power to sell, unless there is an intent manifested by the settler of the trust that its disposition shall be thereby changed, the fund takes the place of the land which yielded it, to be applied and disposed of in the same manner, until the object of the trust is accomplished. The general rule is, that it is only when it appears that it was the intention of the testator to convert real estate into personal, and definitely to affix to it the latter character, that the law will treat the estate as personal for all the purposes to which the intention of the testator extends. *Hammond* v. *Putnam*, 110 Mass. 232.

So far is this from appearing in the case at bar, the language of the testatrix heretofore quoted shows a clearly expressed intention that the proceeds of her real estate, if sold, shall be held for all purposes as real estate. The trustee, so far as Josiah S. Priest was concerned, held the proceeds of the real estate as realty, and so far as he and the trustee were concerned, they would not lose that character until as such they reached him. "As a general rule to be deduced from the cases, we think," says Chief Justice Shaw, "that in case of such conversion of real into personal estate, to stand in place of the real, as more beneficial to the parties, without changing the beneficial destination, the character thus impressed on the money will attach to it, until it reaches one who, if it had remained real estate, would take it beneficially, that is, to his own use absolutely, or with a power, like that of tenant in tail in possession, to dispose of it absolutely, or make it his own to all purposes, and it will then be his absolutely." *Holland* v. *Adams*, 3 Gray, 188, 191. While upon reaching him the proceeds would not have retained their artificial character, Priest would yet have received them as realty.

The conveyance by Priest to Hovey did not change the character of the estate or the construction of the will. The estate

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was received by Hovey as real estate, and the proceeds of it when it was sold continued to be real estate as long as it remained under the operation of the will. At the death of Hovey two parcels had been sold and two remained unsold, but the whole constituted one fund made by the will real estate, and the interest in the whole passed to the heirs of Hovey.

Bill dismissed.

HENRY E. DAY *vs.* ALEXANDER ROSS.

Norfolk. November 20, 1890. — May 20, 1891.

Present: FIELD, C. J., W. ALLEN, HOLMES, & MORTON, JJ.

Assault and Battery — Evidence — Reputation.

In an action for assault and battery, a witness was asked, against the plaintiff's objection, whether the defendant was "a thoroughly peaceable man as far as you know," and he was permitted to answer, "As far as I know; I never heard of his making any assault before." *Held*, that the plaintiff had good ground of exception.

At the trial of an action for assault and battery, there was evidence that, upon a dispute arising between the parties, the defendant ordered the plaintiff to leave his office, and he did so; that the plaintiff soon attempted to re-enter the office, and the alleged assault was then committed; and that the plaintiff's purpose in returning related to another matter of business. The presiding judge instructed the jury that the secret purpose of the plaintiff in returning should not bear upon the defendant's conduct, unless he knew or had reason to know that the return of the plaintiff was for a purpose other than that for which he was originally there. *Held*, that the instruction was correct.

TORT for an assault and battery. Trial in the Superior Court, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence that the plaintiff, who was in the defendant's employ, went to the defendant's office where a dispute arose respecting the amount due the plaintiff for work done for the defendant; and that the defendant ordered the plaintiff to leave the office, whereupon he left. The plaintiff testified that after leaving the office it occurred to him that he had a bill against the defendant for certain hay, and that upon his returning to the defendant's office for the purpose of demanding pay-

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ment of this bill, he was struck by the defendant. A witness for the plaintiff testified, on cross-examination, that he knew the defendant very well. He was then asked, against the plaintiff's objection, "Is Mr. Ross a thoroughly peaceable man as far as you know?" and he was permitted to answer, "As far as I know; I never heard of his making any assault before"; and the plaintiff excepted.

The judge instructed the jury, among other things, "that the secret purpose of the plaintiff to return to the store for the sake of getting payment of his hay bill, he having been ordered out, is not to bear upon the conduct which the defendant should exercise toward the plaintiff, unless the defendant knew, or had reason to know or believe, that the return of the plaintiff was for a purpose other than that for which he was originally there."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. Everett, for the plaintiff.

H. E. Fales, for the defendant.

W. ALLEN, J. A witness for the plaintiff testified, on examination by the defendant, that he knew the defendant very well. He was then asked the question, "Is Mr. Ross a thoroughly peaceable man as far as you know?" This question was objected to and admitted; the answer was, "As far as I know; I never heard of his making any assault before." It is clearly incompetent for a defendant in an action of tort for assault and battery to prove in defence his good character as a peaceable man. It is said that the plaintiff was not aggrieved by the admission of the question, because the answer was not evidence of the character of the defendant, and only showed that the witness had no knowledge on the subject. But the evidence was competent to prove character. Character is proved by reputation, and evidence that those who have known a man in the community never heard anything against his reputation as a peaceable man is evidence of good reputation in that respect. In the absence of particular objection and of further inquiry, the answer would have been competent had it been competent for the defendant to prove his good character.

Upon the evidence that the plaintiff went to the defendant's office, and that a dispute arose between them upon a matter of

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business, that the plaintiff was ordered to leave the office and left, and that upon his soon attempting to re-enter the office the alleged assault was committed, and that his purpose in returning related to another matter of business, the instruction that the secret purpose of the plaintiff in returning should not bear upon the defendant's conduct unless he knew or had reason to believe that the return of the plaintiff was for a purpose other than that for which he was originally there was correct. The unmanifested thoughts of the plaintiff could not affect the character of the defendant's acts. *Exceptions sustained.*

SALEM LYCEUM *vs.* CITY OF SALEM.

Essex. November 21, 1890. — May 20, 1891.

Present: FIELD, C. J., W. ALLEN, HOLMES, & MORTON, JJ.

Tax — Exemption — Literary Purpose.

If a corporation, organized "for the purpose of diffusing knowledge and promoting intellectual improvement" in a certain city, occupies a hall in a building owned by it for a few evenings only each winter for a course of lectures on literary and scientific subjects, and during the rest of the year lets the hall for various purposes, the estate is not exempt from taxation under the Pub. Sts. c. 11, § 5, cl. 3, although the income derived from letting the hall is devoted exclusively to making provision for such courses of lectures.

CONTRACT, to recover taxes paid under protest, in the years 1884 to 1887 inclusive. Trial in the Superior Court, without a jury, before *Pitman*, J., who found for the defendant, and reported the case for the determination of this court. The facts appear in the opinion.

S. C. Bancroft & N. J. Holden, for the plaintiff.

F. L. Evans, for the defendant.

W. ALLEN, J. The Pub. Sts. c. 11, § 5, cl. 3, exempt from taxation "the personal property of literary, benevolent, charitable, and scientific institutions incorporated within this Commonwealth, and the real estate belonging to such institutions, occupied by them or their officers for the purposes for which

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they were incorporated." The plaintiff was incorporated in the year 1852, by a special act, "for the purpose of diffusing knowledge and promoting intellectual improvement in the city of Salem." St. 1852, c. 120.

The plaintiff owns a lot of land in Salem, upon which is a building containing a large hall and two small anterooms, and the necessary passageways, but no other rooms. This action is to recover taxes assessed upon said real estate, and paid under protest, and the only question presented on the report is whether the estate was exempt from taxation under the statute cited above.

It is very clear that the finding of the court, that the substantial use and occupation of the real estate were not for the purposes for which the corporation was organized, was sustained by the evidence. There was evidence to show that the plaintiff had occupied the hall for six or eight evenings in the winter of each year, except the winter of 1886, for a course of lectures upon literary and scientific subjects, and at all other times the hall had been held for the purpose of being let, and had been let to any persons who applied and paid for the same. The occupation of the hall for the various purposes for which rental was paid to the plaintiffs, as for lectures, concerts, shows, entertainments, conventions, and other purposes for which a hall is commonly used, was very much in excess of its occupancy by the plaintiff itself, and the income derived from the letting of the hall largely exceeded the income from the lectures, for which alone the hall was occupied by the plaintiff. The letting was not an occupation by the plaintiff or its officers for the purposes for which it was incorporated. *Chapel of the Good Shepherd* v. *Boston*, 120 Mass. 212.

The other question is, whether the occupation of the building by the plaintiff for a course of six or eight lectures annually would exempt the estate from taxation, although it was held all the rest of the time to rent for income, the principal use being for income from lettings. It is contended that the income went to the plaintiff corporation, and was not divided amongst its members, and that the whole income was used to maintain the hall and estate, so that it could be used for the annual course of lectures for which it was occupied by the plaintiff. But it

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is immaterial in what manner the income was used. The exemption from taxation does not extend to estate owned by the plaintiff, and allowed by it to be occupied by others, with the purpose of deriving income to expend in diffusing knowledge and promoting intellectual improvement in Salem. Those are the purposes for which the estate must be occupied by the plaintiff itself to exempt it from taxation. If the principal occupation is by the plaintiff for those purposes, occasional and incidental use for other purposes might not render it liable to taxation; but when the substantial use and occupation is for the purpose of deriving income from it, it makes no difference if that income is used to provide a course of lectures once a year in the hall. *Pierce* v. *Cambridge*, 2 Cush. 611. *Wesleyan Academy* v. *Wilbraham*, 99 Mass. 599. *Mount Hermon Boys' School* v. *Gill*, 145 Mass. 139. *St. James Educational Institute* v. *Salem*, 153 Mass. 185. *Judgment on the finding.*

TIMOTHY McCARTY *vs.* FITCHBURG RAILROAD COMPANY.

Suffolk. March 9, 1891. — May 20, 1891.

Present: FIELD, C. J., C. ALLEN, HOLMES, & MORTON, JJ.

Personal Injuries — Negligence — Fencing Railroad — View by Jury.

A boy strayed from a public street upon an adjacent railroad track, and was run over and injured at a point where it was customary to unload freight from the cars on to teams standing in the street. At the trial, sixteen months later, of an action against the railroad company to recover for such injuries because of its neglect to fence the track, the plaintiff's evidence did not show affirmatively that a fence at such point would not have obstructed the convenient use of the railroad. The presiding judge ruled that the plaintiff could not recover, and ordered a verdict for the defendant; and the plaintiff alleged exceptions which recited that the jury took "a view of the premises," without more. *Held*, that the plaintiff showed no ground of exception.

TORT, for personal injuries to the plaintiff, a child five years of age, alleged to have been occasioned by his being run over by a train of the defendant on July 16, 1889. Trial in the Superior Court, at the November sitting of 1890, before *Ham-*

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mond, J., who allowed a bill of exceptions, which, so far as material to the points decided, was as follows.

The plaintiff's evidence tended to prove, among others, the following facts. The plaintiff lived with his mother in that part of Boston called Charlestown, the yard in the rear of her tenement opening by means of a gate upon Jenner Street. This street ran southerly into Front Street, which ran from east to west and abutted upon two tracks of the defendant corporation used for freight purposes. There existed no fence or barrier between Front Street and the defendant's tracks. Mason Street also ran into Front Street parallel with and at a distance of one hundred and ten feet west from Jenner Street. A freight-house of the defendant was situated on the opposite side of these tracks from Front Street, the westerly end of which stood about one hundred and sixteen feet east of Jenner Street, making the distance from the foot of Mason Street to the freight-house about two hundred and twenty-six feet. The accident occurred about half past six o'clock in the afternoon, and the plaintiff was last seen by his mother, before it happened, in the yard off Jenner Street, and by an aunt standing just outside of the gate on that street. A few minutes later he was picked up from the defendant's tracks badly injured, just after a freight train had passed along. The bill of exceptions disclosed no evidence respecting the plaintiff's movements from the time he was seen in the yard until the time he was found lying upon the railroad tracks. One McCarty testified that the place where the plaintiff was injured was just opposite the foot of Mason Street, at its junction with Front Street. One Sullivan testified that freight was constantly unloaded from freight cars standing on these tracks on to teams standing on Front Street, within the space between the end of the freight-house on the east and Mason Street on the west.

The plaintiff contended, among other things, that under the provisions of the Pub. Sts. c. 112, § 115, the defendant ought to have had a fence between Front Street and the railroad tracks which would have kept the plaintiff off; but there was no testimony to show that a fence at the place of the injury would not have obstructed the convenient use of the railroad in loading and unloading cars.

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The bill of exceptions recited that "a view of the premises was taken by the jury, the place of the accident and the place where freight was unloaded were shown," without further reference to such view.

The defendant offered no evidence, and the judge ruled that the evidence introduced was insufficient to support a verdict for the plaintiff, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

A. H. Russell & F. C. Manchester, for the plaintiff.

G. A. Torrey, for the defendant.

C. ALLEN, J. The plaintiff complains of the ruling that there was not sufficient evidence to support a verdict in his favor, and it is incumbent on him to make it appear to us that there was some evidence which would have warranted such a verdict. If it be assumed that the defendant with its engine or cars ran over the plaintiff, we can find nothing in the bill of exceptions to show any gross or reckless carelessness on its part, or the breach of any duty which the defendant owed to the plaintiff. The plaintiff was alone upon the railroad track. Apparently he had escaped from immediate supervision, and walked down Jenner Street to Front Street, and then, at some point which there was no evidence to fix, had crossed Front Street and passed upon the railroad track. It is now urged that the defendant ought to have had a fence between Front Street and the railroad track, which would have kept the plaintiff off. The requirement of the Pub. Sts. c. 112, § 115, in relation to building fences, does not include places where the convenient use of the road would be thereby obstructed. There was nothing to show that the requirement to fence the track included such place or places as would have cut off the plaintiff's approach and entry upon it. One of the plaintiff's witnesses testified that freight was unloaded from the cars on to teams on Front Street, between Mason Street and the end of the freight-house, which was a distance of two hundred and twenty-six feet; and another of his witnesses testified that the place where the boy was injured was just opposite the foot of Mason Street where it joins Front Street. It would thus appear that the place where the plaintiff received his injury must have been very near, if not exactly upon, the place where

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it was customary to unload freight from the cars on to teams on Front Street. Certainly there is nothing in this testimony to show, affirmatively, that a fence at the place of the injury would not have obstructed the convenient use of the railroad in loading and unloading cars. But the plaintiff relies on the fact that the jury took a view of the premises, and he urges upon us that, from what was seen at the view, the jury might have found that the defendant ought to have had such a fence there. Now this, so far as the argument is addressed to us, is a mere conjecture. No plan was shown to us, and there was nothing to show that the convenient use of the railroad would have permitted the erection of such a fence. No doubt a view is often advantageous in enabling a jury better to understand the testimony of witnesses, and they may derive some additional information not directly testified to which may be considered by them. Nevertheless, even where the statutes have given a positive right to either party to have the jury take a view of land for the purpose of aiding in their estimation of its value, the court may set aside their verdict on the question of damages, as well as on other grounds. *Harding* v. *Medway*, 10 Met. 465. *Fitchburg Railroad* v. *Eastern Railroad*, 6 Allen, 98. *Tully* v. *Fitchburg Railroad*, 134 Mass. 499, 503. If in such cases the court may set aside the verdict, clearly it may rule that the evidence is insufficient to warrant a verdict. The plaintiff in the present case entirely fails to make it appear in his bill of exceptions that there was anything before the jury, to be derived either from the testimony or from their view of the premises, which would have warranted a verdict for him. Merely stating that the jury took a view of the premises, without showing that anything was to be seen there which would show the duty to build and keep a fence at the place of the plaintiff's entrance upon the railroad track, will not entitle the plaintiff to a reversal of the ruling of the presiding justice. The trial was about sixteen months after the accident. We cannot see how the view of the premises, either taken by itself alone, or in connection with any evidence which is reported in the bill of exceptions, could have enabled the jury properly to find that the defendant ought to have had a fence at such places as would have kept the plaintiff off from the track at the place where the accident happened.

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The case much resembles *Morrissey* v. *Eastern Railroad*, 126 Mass. 377. See also *McEachern* v. *Boston & Maine Railroad*, 150 Mass. 515. *Exceptions overruled.*

BRIDGET DONAHUE *vs.* T. PICKERING DROWN.

Suffolk. March 10, 1891. — May 20, 1891.

Present: FIELD, C. J., C. ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Personal Injuries — Master and Servant — Negligence — Due Care.

A girl employed in a factory was set to clean a machine not in motion, and, while doing so in a way which was safe if it so remained, but dangerous otherwise, was injured by its starting up. In an action for such injuries brought by her against her employer, there was evidence that the starting of the machine was caused by a casual shifting of a belt, which a proper construction and arrangement of pulleys and adjustment of the belt would have prevented; and that she was not aware of the danger, and believed the machine to be all right, although she had seen one other machine so start, upon which she was not working at the time. *Held*, that the case was properly submitted to the jury.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. At the trial in the Superior Court, before *Lathrop*, J., there was evidence tending to prove the following facts.

The defendant was a manufacturer of candy, and on October 9, 1888, the plaintiff, who was then twenty years old and had been in his employ for about a year, was set to work by his foreman to clean one of the machines in his factory. This machine was fastened to the floor, and consisted in part of an upright cylinder for receiving the sugar paste out of which a form of candy was made. At the bottom of the cylinder was a revolving screw for seizing and forcing the paste through the small holes of a disk, placed opposite the end of it, whence it appeared in the form of long pipe-stems, which were then dried and cut up into pieces. This screw was made to revolve by a belt connecting a fixed pulley on the machine with a driving pulley attached to the main shaft of the factory. Alongside this fixed pulley, and separated from it by the distance of half an inch, was a loose pulley on the machine. To stop the machine when

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in motion, it was only necessary to throw the belt from the fixed to the loose pulley by means of a shipper, so called, which was made of wood and placed at a distance of about eighteen inches from the cylinder, and worked up and down. To shift the belt from the loose to the fixed pulley, the shipper was pulled down. This shipper was improperly secured at the end, and was loose. When the machine was to be cleaned, a trough upon the top of the cylinder, and from which the paste was fed into it, was taken off, and the interior of the cylinder including the screw exposed to view. When the plaintiff was ordered to clean the machine, it was not in motion. The cylinder was cleaned by pouring in hot water to melt the paste sticking to the different portions of its interior, so that it would float off with the water through the bottom of the machine, or by scraping off such paste therefrom. A small iron scraper was sometimes used thus to remove the paste, and rags were used to wipe out the inside of the cylinder. The plaintiff proceeded to clean the machine by pouring hot water into the cylinder to melt the paste still sticking to it. Some of the paste stuck to the screw, and the plaintiff put her left hand down into the cylinder to take it off with her fingers. At this moment the belt shifted from the loose pulley to the fixed pulley, and the screw began to revolve, and the plaintiff's hand and arm were caught, and she suffered the injuries in question.

Other machines in the defendant's factory had previously started of themselves, and this machine, after the belt had been thrown off by the shipper, had started of itself a month before the accident, as well as afterwards. One Genary, an expert called by the plaintiff, testified, among other things, that in his opinion the machine was defective in that it was not put up properly; that the driving pulley upon the main shaft had a convex surface, instead of a flat surface such as it should have had, and was so situated with reference to the fixed pulley that the tendency was to draw the belt from the loose pulley when the machine was not in motion on to the fixed pulley, and thus to start the machine; and that this tendency was increased by the looseness of the shipper. The plaintiff testified that when she put her hand in the cylinder she did not know that there was any danger in so doing; that she had never seen any other machine that she had worked on start of itself; but that she

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had seen other machines in the factory, upon which she was not at work, start of themselves, which fact she had not reported because she did not think it her duty to do so.

The defendant testified that he had never had his attention called to the fact that the machine started of itself until this accident; and that he had never heard and did not believe that the machine could start of itself. The defendant's foreman testified that in his judgment the machine could not start of itself without help, and that he had never heard or known that anything was the matter with the machine; and the defendant's engineer and carpenter both testified that they had never heard of this machine starting of itself.

The judge refused to rule, as requested by the defendant, that the plaintiff was not entitled to recover, and submitted the case to the jury; and the defendant, after a verdict for the plaintiff, alleged exceptions.

H. M. Rogers & J. Lowell, Jr., for the defendant.

E. C. Bumpus & P. R. Blackmur, for the plaintiff.

C. ALLEN, J. It was contended by the plaintiff, and there was some evidence to show, that the machine which the plaintiff was engaged in cleaning, as well as some others of the defendant's machines, would "start of themselves," that is, without being started by any person's direct act. The defendant contended that, if the fact was so, it was not known to himself or to his foreman. He testified, indeed, that this machine could not start of itself. The cause of the machine's thus starting of itself, if that did in fact so happen, must be the shifting of the belt from the loose pulley to the fixed pulley. The jury might properly find, upon the evidence, that this was the cause of the starting of the machine at the time of the injury to the plaintiff, and that a proper construction and arrangement of the pulleys and adjustment of the belt would have prevented such a casual shifting of the belt. They might, therefore, properly infer negligence on the part of the defendant in failing to provide machinery constructed, arranged, or set up in such suitable manner as to be sufficiently safe, and that a due examination of the machinery would have disclosed its imperfection. The plaintiff's expert testified that there was a tendency to throw the belt over from the loose pulley on to the fixed pulley, and thus

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to start up the screw in the bottom of the cylinder. If this was the fact, it was sufficient to warrant a finding of the defendant's negligence. The omission to provide machinery properly prepared and arranged to guard against a danger of that kind would be negligence for which the master would be responsible, and not merely the negligence of a fellow servant.

But it is contended on the part of the defendant, that, if this danger existed, it was a matter of common knowledge among the operatives, and that the plaintiff herself in the exercise of due care ought to have known it. It is conceded that no notice was given to her of the danger, and there could not have been, since the defendant and his engineer, carpenter, and foreman testified that they were not aware of its existence. The plaintiff, on the other hand, testified that she was not aware of it either, and she contends that she ought not to be held to a higher degree of knowledge than they possessed. She was set to clean a machine which was not in operation, and she was performing this service in a way which would have been safe if the machine did not start up, but which would be dangerous if it were to start up. It becomes a question, therefore, whether she was bound to anticipate that it might start up. The case is obviously different from those where one has been hurt while at work upon or with a machine which was in motion. Here the machine was at rest, and it was to be cleaned by the plaintiff while at rest. If she had put her hand into the cylinder while the screw was in motion, that might be deemed an act of carelessness. But, according to her testimony, she put her hand in while the screw was still, and it started up of itself while her hand was in, so that the question is whether she ought to have anticipated that this might so happen. She testified that she had never seen this machine start of itself, and did not know that it had ever done so; though she had seen other machines so start, at least one other, upon which she was not working at the time. The fact that this had happened within her knowledge with other machines, equipped with other pulleys and belts, might or might not be deemed sufficient to put her on her guard. That would be for the jury to say. As to this particular machine, she testified that she did not suppose or suspect that there was anything out of order, or wrong, or defective, but that she believed it to be all

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right. It cannot be said, as matter of law, that she must be held to have been negligent, or to have assumed the risk.

The defendant further contends, that she should have used a scraper to scrape off the paste that stuck to the parts of the machine, or have relied on hot water alone to melt it so that it would float off. There was testimony that a little iron scraper was sometimes used for this purpose. This is a detail in the manner of cleaning the machine in respect to which the jury who saw it could determine better than we. There was other testimony that rags were used for wiping the inside of the cylinder, and this, as well as the use of the little scraper, would seem naturally to involve putting the hand into the cylinder, though possibly the work might have been done otherwise.

On the whole, we find nothing which would have warranted the withdrawal of the case from the jury.

Exceptions overruled.

GEORGE T. SCOTT *vs.* BENJAMIN P. ELDRIDGE & others.

Suffolk. March 11, 1891. — May 20, 1891.

Present: FIELD, C. J., C. ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Arrest without a Warrant — Misdemeanor.

A peace officer is not authorized to make an arrest in this State, without a warrant, for a past misdemeanor committed in another State.

TORT, to recover damages for an arrest and detention of the plaintiff by the defendants. At the trial in the Superior Court, before *Lathrop*, J., the jury returned a verdict of guilty; and the defendants Eldridge and Robinson alleged exceptions, which, so far as material to the point decided, appear in the opinion.

T. J. Gargan & P. M. Keating, for the defendants.

G. R. Swasey & J. H. Flint, for the plaintiff.

C. ALLEN, J. The case is shortly as follows. A letter came to the defendant Eldridge, who was the chief of the department of inspectors of the police of Boston, from some one who purported to be the chief of detectives of the police of Philadelphia,

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saying that a colored man named Robert Scott, alias George R. Scott, who was described in detail, was wanted, and asking that, if found, he should be arrested and charged with conspiracy to commit an abortion, adding, "I hold our coroner's warrant." In pursuance of this request, the defendants Eldridge and Robinson, the latter being an inspector under Eldridge, arrested the plaintiff, detained him for twenty-four hours, and then discharged him from custody without any legal complaint having been made or legal process issued. The plaintiff brought this action for the arrest. At the trial, the defendants contended that being a party to conspiracy to commit an abortion was a felony according to the laws of Pennsylvania, and put in evidence Brightly & Purdon's Digest, page 431, §§ 156, 157; and they asked the court to instruct the jury that, if the defendants had reasonable ground to believe that the plaintiff had committed a felony in Pennsylvania, they were justified in arresting and detaining him. The court refused to give this instruction, and ruled that no justification was shown for the arrest. A verdict was accordingly returned for the plaintiff.

The statutes of Pennsylvania which were put in evidence relate to the offence of abortion, and not to that of conspiracy. No statute of Pennsylvania relating to conspiracy being shown, we must go to the common law to ascertain if such a conspiracy is a felony; and by the common law it clearly is not. *Regina* v. *Button*, 11 Q. B. 929. *People* v. *Mather*, 4 Wend. 229, 265. 2 Bish. Crim. Law, (7th ed.) § 240. There was, therefore, nothing to show that the defendants had any reason to think that the plaintiff had committed a felony. We cannot accept the defendants' suggestion in the argument, that the letter furnished ground to believe that the plaintiff had committed an abortion in Pennsylvania, which is a felony under the statutes referred to. The letter is plain in its request to charge him with a conspiracy, which is an offence of a less grade than felony.

Even if the plaintiff had committed the offence of conspiracy in Massachusetts, the defendants would have had no right to arrest him without a warrant. On reasonable suspicion of felony, a peace officer may make an arrest without a warrant, even though it turns out that in fact no felony has been committed; but he may not without a warrant make an arrest for

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a past misdemeanor though the offence has been committed, unless he is specially authorized by statute to do so. *Commonwealth* v. *Carey*, 12 Cush. 246, 252. *Commonwealth* v. *McLaughlin*, 12 Cush. 615. *Rohan* v. *Sawin*, 5 Cush. 281. *Kurtz* v. *Moffitt*, 115 U. S. 487, 499. *Samuel* v. *Payne*, 1 Doug. 359; *S. C.* 1 Bennett & Heard's Lead. Cas. 194, and Bennett's note, 197 *et seq.* If a peace officer would have had no right to arrest the plaintiff for a past misdemeanor committed in Massachusetts, certainly he could have no greater right in respect to a misdemeanor committed in another State. So that even assuming that the plaintiff had committed a misdemeanor in Pennsylvania (which was not shown), his arrest without a warrant was illegal.

This view of the case being decisive, we have no occasion to consider whether it is necessary, in case of a felony committed in another State, to pursue the course pointed out in the statute (Pub. Sts. c. 218, § 7), or the other objections urged by the plaintiff against the validity of his arrest.

Exceptions overruled.

DARIUS WELLINGTON *vs.* WILLIAM D. SWASEY.

Suffolk. March 11, 1891. — May 20, 1891.

Present: FIELD, C. J., C. ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Covenant — Breach — Satisfaction.

In an action for breach of covenant to deliver a deed, it appeared that the alleged breach consisted in the absence of seals from the instrument accepted by the plaintiff; that thereafter the plaintiff conveyed the land to his brother, who subsequently brought a bill in equity in the plaintiff's name to compel the sealing of the instrument; that before taking any further steps in the cause the brother, with the plaintiff's assent, paid the defendant for affixing the proper seals; and that thereupon the plaintiff repaid the amount, and sought to recover it of the defendant in the action. *Held*, that the plaintiff's claim on the covenant, if any, was satisfied by the settlement made with his assent; and that the action could not be maintained.

CONTRACT for breach of covenant in a bond for a deed. Trial in the Superior Court, before *Thompson*, J., who ordered a verdict for the defendant, and reported the case for the determination of this court, in substance as follows.

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On September 22, 1874, the defendant executed the bond or obligation in question, which was conditioned upon the defendant's giving to the plaintiff "a good and sufficient title by deed of warranty" of a parcel of land in Maine, upon the payment by the latter of two promissory notes. The plaintiff paid the notes in question in February, 1877, and in the March following the defendant executed and the plaintiff accepted a paper writing purporting to be a warranty deed of such parcel, which was duly recorded in 1880. In 1881 the plaintiff conveyed the land by a deed of warranty to his brother, Cornelius Wellington, for a valuable consideration. In 1887 Cornelius conveyed the land to a third person by deed, at which time it was ascertained that the instrument purporting to be a deed given by the defendant to the plaintiff in March, 1877, had no seals upon it, whereupon Cornelius brought a bill in equity in the name of the plaintiff to compel the defendant to affix seals to that instrument. During the pendency of the bill, Cornelius, in order to perfect his own title and that of those claiming under him by perfecting the title of the plaintiff, and to avoid loss and litigation, paid to the defendant the sum of fifteen hundred dollars. By the agreement of the parties, the title was perfected by placing seals upon the instrument of March, 1877, whereupon the bill in equity was dismissed without prejudice; and subsequently Cornelius demanded of the plaintiff the amount paid by him to the defendant, and the plaintiff paid the same to him.

If upon these facts the plaintiff was not entitled to recover, judgment was to be entered upon the verdict; otherwise, a new trial was to be granted.

J. S. Patton, (*L. G. Blair* with him,) for the plaintiff.

H. D. Hadlock, for the defendant.

HOLMES, J. We assume in the plaintiff's favor that he shows a covenant by the defendant to deliver a deed, and a breach by reason of the absence of seals from the instrument which the plaintiff accepted. After the execution of the instrument the plaintiff conveyed the land described in it to his brother Cornelius. Later, Cornelius brought a bill in equity in the name of the plaintiff, Darius, to compel the sealing of the instrument, and then, seemingly before any further step had been taken in the cause, Cornelius paid the defendant fifteen

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hundred dollars, and the defendant caused the proper seals to be affixed. This was done by the agreement of the parties, including, as we understand the report, the plaintiff, Darius, who was the nominal plaintiff in the bill in equity.

If the plaintiff had paid the money, the sealing of the deed would have imported satisfaction of the plaintiff's claim on the covenant, and the same must be taken to be true when the money was paid by a third person with the plaintiff's assent, the whole transaction being a settlement of a controversy upon that covenant then pending in the plaintiff's name. If the payment had not been with the plaintiff's assent, it is difficult to see how he could recover more than nominal damages. For his case is that the defendant's agreement still binds him, and if so, the payment made by the plaintiff's brother in order to induce the defendant to do what he had covenanted to do by this same agreement was not necessary, but the defendant might have been compelled to do it by prosecuting the bill in equity. Therefore the plaintiff was not bound by the covenants in his deed to indemnify his brother for the payment, and cannot recover what he paid from the defendant. Without considering further objections to the plaintiff's recovery, we are of opinion that the ruling for the defendant was right.

Judgment on the verdict.

AUGUSTUS MAY *vs.* WHITTIER MACHINE COMPANY.

Suffolk. March 11, 12, 1891. — May 20, 1891.

Present: FIELD, C. J., C. ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Personal Injuries — Master and Servant — Employers' Liability Act.

In an action for personal injuries brought by an employee, in which there were two counts in the declaration, the first at common law and the second under the St. of 1887, c. 270, § 1, there was evidence that the plaintiff, while engaged in helping another servant of the defendant in planing a board on a planing machine, started to go to the other end of the machine, slipped or stumbled, put his hand on the machine, and was hurt; that there was an open floor in front of the machine by which he could have gone, although it was somewhat obstructed by

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unfinished work, but he went back of the machine instead; that there was a space of three feet and one inch between the back of the planing machine and a band saw at which a man was working within this space; that some small pieces of wood had been piled up against the back of the planing machine by a fellow servant of the plaintiff, making a pile about a foot high and eight and one quarter inches wide, and leaving a clear space of not more than fourteen inches; and that the plaintiff had known of this pile for about a fortnight. The plaintiff, as required by the presiding judge, elected to stand upon the second count, whereupon the judge ruled that there was no evidence to go to the jury, and ordered a verdict for the defendant. *Held*, that the plaintiff had no ground of exception.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. The declaration contained two counts, the first at common law, and the second framed on the St. of 1887, c. 270, § 1, cl. 1. At the trial in the Superior Court, before *Dunbar*, J., the plaintiff, as required by the presiding judge, elected to stand upon the second count, and the judge ruled that there was no evidence to go to the jury, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

L. M. Child, for the plaintiff.

J. B. Warner & H. E. Warner, for the defendant, were not called upon.

HOLMES, J. The plaintiff, while engaged in helping another servant of the defendant in planing a board on a planing machine, started to go to the other end of the machine, slipped or stumbled, put his hand on the machine, and was hurt. There was an open floor in front of the machine by which he could have gone, although the floor was somewhat obstructed by unfinished work. He went by the back of the machine instead. There was an interval of three feet and one inch between the back of the planing machine and a band saw, and a man was working at the band saw in this interval. Some small pieces of wood had been piled up against the back of the planing machine by a fellow servant of the plaintiff, making a pile about a foot high and eight and one quarter inches wide, so that, according to the plaintiff's testimony, the clear space was not more than fourteen inches. The plaintiff had known of the pile for about a fortnight.

On these facts the judge rightly ruled that the plaintiff could not recover on the ground that there was a defect in the condi-

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tion of the ways under the first section of the employers' liability act. St. 1887, c. 270, § 1. Apart from other reasons, the obstructions were only rubbish of accidental and temporary character, which has been declared not to be within the act by *O'Connor* v. *Neal*, 153 Mass. 281.

Assuming, for the sake of argument, that in some cases the plaintiff would have a right to go to the jury upon both a statutory and a common law count, in view of the different possible findings on his evidence, (*Ryalls* v. *Mechanics' Mills*, 150 Mass. 190, 196, and *Whiteside* v. *Brawley*, 152 Mass. 133,) the plaintiff was not injured by being required to elect in the case at bar. If he had sought to recover at common law, the negligence, if there was any, was that of a fellow servant; *Johnson* v. *Boston Tow-Boat Co.* 135 Mass. 209; *Moynihan* v. *Hills Co.* 146 Mass. 586, 593; and there was no ground on which it could have been found that anybody knew or appreciated whatever danger there was more fully than the plaintiff. *Lewis* v. *New York & New England Railroad*, 153 Mass. 73. *Exceptions overruled.*

JOHN T. SHEA *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. March 12, 1891. — May 20, 1891.

Present: FIELD, C. J., C. ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Employers' Liability Act — Loss of Life — Due Care — Burden of Proof — Report after Nonsuit.

If, in an action brought under the St. of 1887, c. 270, § 2, for causing the death of an employee, the evidence introduced is as consistent with carelessness on his part as with his exercise of due care, the plaintiff does not sustain the burden of proof, under § 1, that the deceased was in the exercise of due care and diligence at the time he was killed, and the action cannot be maintained.

TORT, under the St. of 1887, c. 270, § 2, for causing the death of Dennis Shea on November 8, 1887. Writ dated January 23, 1888. Trial in the Superior Court, before *Staples*, J., who reported the case for the determination of this court.

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The report recited the following facts. The deceased at the time of his death was in the employ of the defendant, and had been for thirty years, as a draw-man or switch tender at a draw-bridge upon the defendant's railroad, situated about six hundred feet from its Charlestown station in Boston. At this point the defendant's railroad ran north and south. A shanty used by the deceased stood beside the westerly or inbound track, and about four feet from it, at a distance of about thirty-five feet from the draw. This shanty opened upon the tracks, the space between stretching along towards the draw being planked at a level with the tracks; and it had two windows, one to the south, affording a view of the draw, and the other to the north, affording a view of the westerly track for a distance of about three hundred feet. About half-way between the shanty and the draw stood a switch, on the easterly or outbound track. From three hundred to three hundred and fifty trains passed this point every day at irregular intervals, including the defendant's regular trains, trains of empty cars, shifting engines, and engines going to and from the defendant's roundhouse. Between twenty minutes of six o'clock and ten minutes of six o'clock in the evening, daily, there were due to pass this point successively over the inbound track towards Boston a train called the Medford train, another train composed of empty cars, and two engines, the first to pass being called the Lowell engine, and the other the N. G. Paul. Regarding the circumstances of the death of the deceased, the report contained the following only: "Plaintiff introduced evidence tending to show that Dennis Shea was sitting in the switch-house at and facing the northerly window; at twelve minutes of six he rose, took his lighted lantern, and passed out of the door to go to the switch above mentioned, which it was his duty then to guard. The Medford train, the train of empty cars, and two engines had at this time passed by the switch-house; he paused momentarily on the platform in front of the door, and then went on towards the switch, carrying his lantern in his hand, and when about thirty-two feet away from the door, on the inbound track, was struck and instantly killed by the engine N. G. Paul, which was backing in towards Boston on the inbound track." The N. G. Paul had no light on its tender, neither was its bell rung or its whistle sounded at the time, although it was the custom

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of the road that engines backing down at this point were thus to carry a light and to ring a bell.

At the close of the evidence, the judge ruled that the action could not be maintained, and, the plaintiff having become nonsuit, reported the case for the determination of this court. If the action could be maintained, the nonsuit was to be taken off, and the case to stand for a new trial; otherwise, the nonsuit was to stand.

F. Ranney, for the plaintiff.

W. I. Badger, for the defendant.

C. ALLEN, J. This action was brought under the employers' liability act, (St. 1887, c. 270,) and by virtue of the first section it was necessary for the plaintiff to prove that the deceased himself was in the exercise of due care and diligence at the time he was killed. But the evidence introduced was at least as consistent with carelessness on his part as with his exercise of due care; indeed, it would seem to be more so. Trains and engines were very frequent. There was no legal duty to sound the whistle or ring the bell at this point. The employment of the deceased was such as necessarily required him to look out very carefully for coming engines and trains. There is nothing to show what pains he took to ascertain if an engine was coming. He was upon the track when the engine came along, and the rest is left for conjecture. There is no evidence that he took such precautions as due care and diligence required of him. The burden of proof which rested on the plaintiff upon this point was not sustained. *Hinckley* v. *Cape Cod Railroad*, 120 Mass. 257, 262. *Crafts* v. *Boston*, 109 Mass. 519. *Griffin* v. *Boston & Albany Railroad*, 148 Mass. 143, 145.

Since, under the limitation of the right to bring an action to one year from the occurrence of the accident, no new action can be brought for the cause sued upon, (St. 1887, c. 270, § 3,) we have entertained the question and determined it upon its merits, although it was not strictly regular to report the case to this court upon a nonsuit. Pub. Sts. c. 153, § 6. *Terry* v. *Brightman*, 129 Mass. 535.

Nonsuit to stand.

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ALEXANDER McDONALD *vs.* GEORGE W. FAULKNER.

Middlesex. March 13, 16, 1891. — May 20, 1891.

Present: FIELD, C. J., C. ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Exceptions — Trustee Process — Mortgaged Personal Property — Attachment and Sale — Interest.

Questions of law arising upon an order of the Superior Court, made pursuant to the Pub. Sts. c. 161, § 80, for the payment to a mortgagee of personal property under attachment of what is due on the mortgage, may thereupon be brought to this court by a bill of exceptions.

The provisions for the sale of personal property under attachment contained in the Pub. Sts. c. 161, §§ 89–103, if applicable to mortgaged personal property which has been attached, are nevertheless subordinate to the rights of the mortgagee, under § 80 of that chapter, to have the amount due on the mortgage ascertained as therein provided, and payment thereof ordered or the property restored, irrespective of any such sale or the proceeds thereof.

If personal property mortgaged to secure a note bearing interest at a rate greater than six per cent is attached, and an order made under the Pub. Sts. c. 161, § 80, for the payment of what is due thereon to the mortgagee, interest is to be reckoned on the note at the same rate up to the date of the order, notwithstanding the attachment.

TRUSTEE PROCESS. Certain personal property belonging to the principal defendant, and mortgaged by him to one Seabury to secure three promissory notes, which bore interest at the rate of six per cent per month and were overdue, was attached by the plaintiff in the defendant's hands, and Seabury was summoned as trustee. In the Superior Court, at the hearing upon a motion filed by the trustee, *Brigham*, C. J. refused to rule as requested by the plaintiff; and the plaintiff alleged exceptions, which appear in the opinion.

J. W. Pickering & J. F. Pickering, for the plaintiff.

R. Lund, for the trustee.

HOLMES, J. In this case an attachment was made of personal property, and the mortgagee was summoned as trustee under the Pub. Sts. c. 161, § 79. Subsequently, on application by the plaintiff, the attaching officer, purporting to act under the Pub. Sts. c. 161, § 90 *et seq.*, sold the attached property. The net proceeds of the sale were forty-four dollars and ninety-nine cents. The trustee, as appears by his answers to the plaintiff's inter-

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rogatories, was the holder of three mortgages on the attached property, amounting to three hundred and eight dollars and interest, or much more than the proceeds of the sale. He moved the court for an order of payment as provided in the Pub. Sts. c. 161, § 80. The court found the mortgages to be valid, and that there was due on them upon the day of the order seven hundred and eighty-one dollars and twenty-nine cents, and ordered that sum to be paid in eight days. The case is before us on the plaintiff's exceptions to the refusal of the court to rule in substance that the officer had a right to sell as he did, and that after the sale the court could not order any sum of money to be paid to the trustee and mortgagee in excess of the amount in the officer's hands as shown by his return, and that that amount is presumed to be the equivalent of the property. The plaintiff also excepts to the refusal to rule that interest did not run at the rate stipulated in the notes after the attachment, and to calculation of interest at the rate of the notes up to the date of the order.

A preliminary objection has been suggested, that the exceptions are premature, and that the proper time to raise the questions argued will be when the mortgagee brings an action for the conversion of the mortgaged property, if he shall see fit to do so hereafter. But this cannot be. If the order of the court stands, it is an adjudication of the matters passed upon by it, and will be conclusive between the parties in any later suit. The court is empowered and directed by the Pub. Sts. c. 161, §§ 80, 81, to inquire into the validity of the mortgage if disputed, to find what is justly due upon it, and to direct the attaching creditor to pay it to the mortgagee within a certain time. If the creditor does not pay or tender the sum within the time, the attachment is to be void, and the property is to be restored. If the court makes such an order and the property is not restored, and the mortgagee then brings suit, it will be too late to set up that the order was erroneous because it required too large a sum to be paid. An error of that sort would not make the order void, and the attaching creditor will have had the conditions of his right to keep his attachment conclusively established against him.

It is true, however, that the plaintiff's exceptions might be

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disposed of without considering the most important aspect of them. Even if the sale was effective against the mortgagee, so as to substitute the proceeds for the property, and therefore to limit the mortgagee's rights, in case the amount of his debt is not paid, to a return of the proceeds, that would not affect the question to be determined by the court under § 80, or the power of the court to determine it. The inquiry of the court under § 80 has no more to do with the amount of the proceeds where there has been a sale, than it has with the value of the property where there has not been one. By the plain words of the section, the court is to ascertain the amount of the debt in every case, and to order its payment. Then it is for the creditor to make up his mind whether to pay or to lose his attachment. What will be his liability if he does not pay, is a matter which comes up at a later stage.

But to save a second resort to this court we will go further, and say that in our opinion the rulings requested were wrong, and that the sale by the attaching officer did not have the effect attributed to it by the plaintiff. If we should assume, as seems to be assumed in *Porter* v. *Warren*, 119 Mass. 535, 538, as well as in *Jackson* v. *Colcord*, 114 Mass. 60, 62, that the provisions for sale of personal property attached (Pub. Sts. c. 161, §§ 89–103) apply to mortgaged as well as to unencumbered property, nevertheless we should be of opinion that they are subject to the peremptory and unqualified enactment in § 80, that, if the attaching creditor does not pay as directed, the attachment shall be void and the property shall be restored.

Something must yield in order to reconcile the different parts of the chapter, and both the history of legislation and considerations of justice convince us that, if the provisions for sale apply at all, they are subordinate to the rights of the mortgagee. The provisions for sale go back to the St. of 1822, c. 93. At that time mortgaged personal property was not subject to attachment. In 1829 attachment of such property was permitted, but on the express condition that the mortgagee should first be paid or tendered the full amount of his demand. St. 1829, c. 124, § 2. At this time, therefore, there could be no question as to selling perishable property before the mortgagee was paid. At this time, also, so far as we know, there were no provisions for

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the recording of mortgages, which seems first to have been introduced by the St. of 1832, c. 157, and it was assumed that the property would be in the mortgagee's hands, as appears by the language of the act of 1829, (§ 1, the mortgagee "shall deliver over the property," and § 2, "mortgagee, pledgee, or holder,") and of the note by the Commissioners to the Rev. Sts. c. 90, § 69, "when he finds his pledge taken from him." It follows that the mortgagee was assumed to know of the attachment as soon as it was made. The Revised Statutes (c. 90, § 78 *et seq.*) in their revision of the act of 1829 make the same assumption, notwithstanding the fact that in the mean time recording had been provided as a substitute for possession. Making this assumption, the revisers, instead of keeping the condition precedent that the mortgagee should be paid, contented themselves with providing that the attachment should be dissolved and the property restored, and that the attaching creditor should be liable for any damages, etc., unless the amount of the mortgage debt was paid or tendered within twenty-four hours after the mortgagee, pawnee, or holder had demanded payment and rendered a just and true account of the debt. Rev. Sts. c. 90, § 79. Commissioners' note to § 69. Certainly, after reading the acts and notes which we have cited, it is hard to believe that thus far it ever had been supposed that mortgaged chattels could be sold by the attaching officer, and it is quite incredible that there was any power to override by a sale the mortgagee's right to a return. Evidently it was expected that the mortgagee would be paid, or would receive back his pledge, in a very short time after the attachment.

Next came the act of 1844. St. 1844, c. 148, §§ 2–6. Gen. Sts. c. 123, §§ 67–71. Pub. Sts. c. 161, §§ 79–83. This provides for attachment of mortgaged property in the hands of the mortgagor, and allows the mortgagee to be summoned as trustee and questioned as to the *bona fides* of the mortgage. Under this statute the mortgagee has not the right to payment within ten days, but must await the determination of the validity of his mortgage and of the amount due upon it. *Martin* v. *Bayley*, 1 Allen, 381, 383. But when the amount is determined, the statute says, in terms, as the Public Statutes still say, that unless it is paid the attachment shall be void and the property

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restored. St. 1844, c. 148, § 3. When the act of 1844 was passed, even if the existing provisions for sale applied to mortgaged property, this sweeping provision of § 3 plainly overrode them and governed every attachment made under the act. But if that was its construction then, that is still its construction, notwithstanding its codification in the General Statutes and the Public Statutes. *Wright* v. *Dressel*, 140 Mass. 147, 149. It is under this act as codified that the plaintiff proceeded.

It may be said that our construction renders the right to attach mortgaged perishable property in this manner of little value, as it either takes away or makes impracticable and valueless the right to sell the goods attached. Very possibly this is true. But there is no justice in extending the hardships which a debtor may have to suffer at the hands of a creditor, to a stranger to the suit, who has a paramount lien on the property. The first consideration is to protect him, and to that the right of attaching his mortgagor's property must yield.

The computation of interest on the notes after maturity at the rate stipulated before maturity, notwithstanding the attachment, was according to the decisions in this State. *Union Institution for Savings* v. *Boston*, 129 Mass. 82. *Lamprey* v. *Mason*, 148 Mass. 231, 235. *Exceptions overruled.*

GEORGE E. POND & others *vs.* ELLEN M. HOPKINS & others.

Suffolk. March 20, 1891. — May 20, 1891.

Present: FIELD, C. J., C. ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Devise — Reformation of Deed — Guardian — Estoppel.

A testator, by his will, with the expressed intention of dividing his property equally among his children, devised certain real estate in trust for the benefit of his three daughters, the trustee being directed to convey an undivided third part thereof to the heirs of either daughter who should die intestate, and gave the residue of his estate to his four sons. The will also provided, in case this division should make the shares unequal, that within two years from the time of the testator's death an appraisal might be had at the request of either son or daughter, or of the trustee, and a new distribution made. The proposed division made the respective shares unequal, but no request was made for an

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appraisal within the time limited. Afterwards the trustee, pursuant to the will, conveyed an undivided third part of the real estate to the children of a deceased daughter; and still later an agreement respecting the settlement of the estate was entered into by the testator's heirs, which did not profess to disturb titles to real estate, and was executed on behalf of one of the grantees of the deed, a minor, by her guardian. *Held*, that the disposition made by the testator of his property must stand in spite of the inequality. *Held, also*, that the agreement did not work an estoppel such as would enable the trustee and the heirs other than the grantees in the deed to have the deed reformed for the purpose of equalizing the division of the estate.

BILL IN EQUITY, filed March 7, 1888, for the reformation of a deed given by the first named plaintiff, as trustee under the will of Moses Pond, to Ellen M. Hopkins and Gertrude D. Payne, two daughters of Ellen M. Dunlap, a deceased daughter of the testator, who alone defended. The case was heard by *C. Allen*, J., and was as follows.

Moses Pond died on May 3, 1870, leaving four sons and three daughters, who either survived him or left issue surviving at his death. The widow also survived him, and died on August 26, 1878. His will, after various bequests and a provision for an annuity in favor of the widow, which was to be a charge on both his real and personal estate, by the fifth article, conveyed all his real estate to "my friend Samuel G. Bowdlear and my sons Joseph A. Pond and George E. Pond," in trust to pay one third of the net income quarterly to each of his three daughters, Ellen M. Dunlap, Eliza B. Pond, and Caroline A. Prince during their natural lives respectively, and on the death of each daughter to convey one undivided third part of such real estate as the daughter so dying should by will direct; but in case such daughter died intestate, then to convey such third part in fee to her heirs. By the same article, he also authorized his trustees to mortgage the estate to raise money "for the purpose of paying off any subsisting mortgages on said premises, and also for the purpose of paying any money which they may be required to pay under the seventh article of this will." By the sixth article of the will, the residue of the testator's estate was given to his four sons, to be equally divided between them, to be held by them "subject however to the provisions in the next article."

The seventh article of the will was as follows: "I intend to make the division of my property as nearly equal as possible, so that each of my sons and daughters shall have one seventh

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of it. But as the value of the real estate given to my daughters may vary, by reason of the payment of mortgages and other circumstances, and the residue left to my sons may also be lessened or increased from various causes, therefore, if any one of my said sons or daughters, or said Bowdlear, shall think the division I have made of my property unequal, then, at any time within two years after my death, on the request of either of my said sons or daughters, or said Bowdlear, a valuation shall be made of the said real estate given in trust for my said daughters, and also of the said residue of my property left to my said sons, the valuation to be made as it was at the day of my death, and if on such valuation it shall appear that the value of my interest in said real property given in trust for my said daughters subject to the mortgages thereon is not equal to three sevenths of all the property, real, personal, and mixed, left by me, after deducting debts, legacies, and charges of administration, then I direct my executors hereinafter named to pay out of my personal property to the said trustees such sum as may be necessary to make the amount of property held by them three sevenths of all the property I may leave, after deducting debts, legacies, and charges of administration, the sum so paid to said trustees to be held and safely invested on the same trusts as are declared concerning the said real estate given in trust, and if possible to be applied towards payment of the mortgages on said real property given in trust; but if, on the other hand, the said residue given my said sons should not be equal to four sevenths of the whole value of all the property, real, personal, and mixed, left by me, after deducting debts, legacies, and charges of administration, then I direct the trustees named in the fifth article to pay to each of my four sons such sum as may be necessary to make the amount of property received by each of my said sons under this will one seventh of all the property I may leave after deducting debts, legacies, and charges of administration; and in order to facilitate the valuation of my property for the purpose aforesaid, in case the valuation made by the appraisers appointed by the Probate Court is not satisfactory, I direct that one person be appointed for the purpose by said Bowdlear, one by said executors, and the third by the two so chosen, whose valuation or that of a majority of them shall be final for the purpose aforesaid."

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Neither Bowdlear nor either of the testator's sons or daughters requested a valuation of the testator's estate under article seven of the will within two years after the testator's death. An appraisal of the estate was made in March, 1872, by three appraisers appointed by the Probate Court, whose return however was never sworn to by either of the executors or filed in court. This appraisal was mislaid, and was not found again until April, 1889, and its contents were not known to the defendants. The estate remained undivided by the consent of those interested therein, and the entire income was treated as a common fund, and distributed semiannually among those entitled thereto, from the time of the death of the testator to the filing of the bill. If the property were to be divided as directed by the will, there would be an inequality in the shares, and the daughters' shares would be the larger. In August, 1879, two of the sons of the testator received their respective shares of the estate by having the same credited against debts owed by them to the estate. On October 20 of the same year the first named plaintiff was appointed and qualified as sole trustee under the will, and he immediately of his own motion, as directed by the will, executed the deed in question, of one undivided third part of the testator's real estate which he held as such trustee, to the defendants. On January 30, 1880, the heirs of Moses Pond entered into an agreement, reciting that they each had consented to the postponement of the final settlement of the estate, owing to the depressed condition of the real estate market and to other causes, that two of the testator's sons who had received their shares in full were paid the same as a step towards such settlement, and that the balance of the estate was held for the benefit of the other parties to the agreement. The parties also agreed to a valuation of the estate made on July 1, 1879, which appraisement, "made pursuant to a direction in the will of Moses Pond and for the purposes of the trust in said will created, must be taken as final." After further recitals relating to the management of the estate, but not mentioning the deed in question, the parties to the agreement released the executors and trustee of the estate of Moses Pond "from any liability which may have been or may be incurred by them or either of them by reason of the facts or things herein recited as having been

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done." This agreement was signed by the guardian of Gertrude D. Payne in her behalf, she being a minor.

The plaintiffs desired to mortgage the real estate of the testator to raise funds to equalize the shares of the sons and daughters, but the defendants refused to mortgage the portion conveyed to them by the deed in question. The plaintiffs contended that this deed, made by the trustee without first having placed a mortgage on the entire real estate for the purpose of equalizing such shares, was contrary to the testator's intention and was void, and ought therefore to be set aside, or reformed so that it should appear that the property was conveyed subject to liability to such mortgage.

The judge dismissed the bill, with costs; and the plaintiffs appealed to the full court.

G. O. Shattuck & R. D. Weston-Smith, for certain of the plaintiffs.

S. J. Thomas, for other plaintiffs.

S. Lincoln, (*Arthur P. French* with him,) for the defendants.

KNOWLTON, J. In the first six articles of the will of Moses Pond, the testator made a complete disposition of his property, and directed particularly what should be done with every part of it. The seventh article is as follows:

"I intend to make the division of my property as nearly equal as possible, so that each of my sons and daughters shall have one seventh of it. But as the value of the real estate given to my daughters may vary, by reason of the payment of mortgages and other circumstances, and the residue left to my sons may also be lessened or increased from various causes, therefore, if any one of my said sons or daughters, or said Bowdlear, shall think the division I have made of my property unequal, then, at any time within two years after my death, on the request of either of my said sons or daughters, or said Bowdlear, a valuation shall be made of the said real estate given in trust for my said daughters, and also of the said residue of my property left to my said sons, the valuation to be made as it was at the day of my death, and if, on such valuation, it shall appear that the value of my interest in said real property given in trust for my said daughters subject to the mortgages thereon is not equal to three sevenths of all the property, real, personal, and mixed, left by me, after deducting debts, legacies, and

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charges of administration, then I direct my executors hereinafter named to pay out of my personal property to the said trustees such sum as may be necessary to make the amount of property held by them three sevenths of all the property I may leave, after deducting debts, legacies, and charges of administration, the sum so paid to said trustees to be held and safely invested on the same trusts as are declared concerning the said real estate given in trust, and if possible to be applied towards payment of the mortgage on said real property given in trust; but if, on the other hand, the said residue given my said sons should not be equal to four sevenths of the whole value of all the property, real, personal, and mixed, left by me, after deducting debts, legacies, and charges of administration, then I direct the trustees named in the fifth article to pay to each of my four sons such sum as may be necessary to make the amount of property received by each of my said sons under this will one seventh of all the property I may leave after deducting debts, legacies, and charges of administration; and in order to facilitate the valuation of my property for the purpose aforesaid, in case the valuation made by the appraisers appointed by the Probate Court is not satisfactory, I direct that one person be appointed for the purpose by said Bowdlear, one by said executors, and the third by the two so chosen, whose valuation or that of a majority of them shall be final for the purpose aforesaid."

In the fifth article Samuel G. Bowdlear is described as his friend, and is made one of his trustees. It appears by the seventh article that the testator supposed that the disposition which he had made of his property in the preceding part of the will would result in a substantially equal division of it, and in that article he provides a mode of revising that disposition if a revision should be asked for by any of the persons interested, or by his friend and trustee, Bowdlear. The basis of the revision is to be a valuation of the property made within two years after his death, the property to be appraised at its value at the time of his death. There is no provision for a valuation, or for a revision of this disposition of the property, after the expiration of two years, and within that time a revision can be had only if one of his sons or daughters, or Bowdlear, thinks the division which he has made unequal,

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and requests that a valuation be made for the purpose of a revision of it. To entitle either of the parties to a modification of the specific provisions made by the will in regard to the different parts of the property, he must take action. He must not only think the division unequal, but he must express his thought to the others interested.

The last part of the seventh article makes a provision "in order to facilitate the valuation," but this becomes operative only in case a valuation is asked for, and it directs the manner of appointing the appraisers, and assumes that the valuation made by the appraisers appointed by the Probate Court may be satisfactory to all parties, in which case that may be taken as the basis of the readjustment instead of a new valuation. It is only when some one of the persons mentioned has expressed the opinion that the division made by the will is unequal, and has requested a valuation under this article within two years after the death of the testator, that the inventory made by the appraisers appointed by the Probate Court becomes of any significance in reference to a readjustment, and then only in case it is satisfactory to all the persons interested.

It seems clear that the disposition of his property made by the testator must stand, unless action is taken under the seventh article of his will, and it also seems clear that no action has been taken under it. So far as appears, there was no intimation on the part of either of the persons named in the will that the division was unequal until nearly ten years after the death of the testator, and then there was no request for a valuation, or expression of a desire to take action under this clause. No valuation has ever been made or asked for with a view to a revision, and no inventory was ever filed by the appraisers appointed by the Probate Court. Since the bringing of this suit, an incomplete and imperfect inventory has been discovered, which was never sworn to by either of the executors, and the existence of which was never known to either of the defendants.

The deed made by George E. Pond as trustee to the defendants, after the death of the testator's widow, and more than nine years after the death of the testator, was properly given in accordance with his duty under the will, and there was at that

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time no longer any right in favor of any of the plaintiffs to have a revision of the disposition which the testator had made of his property.

It remains to consider the effect of the agreement made on January 30, 1880, by the heirs of Moses Pond. Of this it may be said, first, that it was not signed by the defendant, Gertrude D. Payne, who was then a minor, but was executed by her guardian in her behalf, and that her guardian had no authority to bind her by an instrument releasing her rights in real estate. Moreover, the conveyance to the defendants, which is now complained of, had previously been made, and the writing does not profess to disturb titles to real estate. It is an agreement outside of the subject to which this bill particularly relates. The foundation for the relief prayed for must be found elsewhere than in that writing. The agreement does not work an estoppel which will give the plaintiffs a right to have a reformation of the deed in a suit of this kind. What rights the plaintiffs or any of them have under it in other particulars it is unnecessary to decide. *Bill dismissed.*

THOMAS P. PROCTOR *vs.* IRENE A. CLARK & others.

Suffolk. March 25, 26, 1891. — May 20, 1891.

Present: FIELD, C. J., C. ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Devise in Trust — "Heirs at Law" — Sale of Real Estate — Wife as Heir of Husband.

A testator domiciled in this Commonwealth by his will gave the residue of his estate, "real, personal, and mixed," in trust for the benefit of his wife, with a power in the trustee to sell the whole or any part thereof, and directed the trustee, "upon the decease of my said wife, then to pay and convey in fee all the trust property, as it then exists" to the testator's brother, "if then living, but if he is not then living, then to convey the same in fee to his then heirs at law." The brother survived the testator and died before the wife, intestate, and domiciled in another State, leaving a sister as his only next of kin, and a widow. Both of these survived the testator's wife, the brother's widow having meanwhile married again. The trustee sold the real estate, and the trust fund amounted at the death of the testator's wife to more than $20,000. *Held,* that the fund was given to those who would be entitled by the laws of this

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State to succeed to real estate in case of intestacy if the brother had died at the moment appointed for the conveyance; and that the brother's widow was entitled to an estate of inheritance in the fund up to $5,000, under the Pub. Sts. c. 124, § 3, but not to a life interest under that statute in one half of the remainder of the fund.

BILL IN EQUITY, filed February 8, 1890, by the trustee under the will of John T. Hancock, for instructions as to the disposition of a trust fund. The case was heard and reported by *Holmes*, J., for the consideration of the full court, and was as follows.

John T. Hancock, of Boston in this Commonwealth, died on October 7, 1881, and by his will, which was duly admitted to probate, in the fifth article directed his trustee in a certain event to convey certain land "to my brother, Charles Henry Hancock of the State of Minnesota, if then living, but if he is not then living, then to convey the same in fee to his then heirs at law," and in the sixth article gave "all the rest, residue, and remainder of my estate, real, personal, and mixed," to his trustee, "in trust, nevertheless, for the following purposes:

"1st. To invest, and from time to time reinvest the same with a view to safety and profit, with power to keep the same invested as it may be at the time of my decease. And if at any time my said wife shall in writing so request, I desire that my said trustee shall sell the whole or any part of my real or personal property devised and bequeathed in this article of my will to said trustee, and reinvest the proceeds of such sale. And I hereby authorize and empower my said trustee at any time, either with or without such request to sell at public or private sale, and execute deeds to convey, the whole or any part of the estate, real or personal, that may at the time be embraced in this trust, and to invest the proceeds according to his judgment; and no purchaser shall be liable to see to the application of the purchase money.

"2d. To pay the net income, as it accrues, to my said wife, Nancy Jennings Hancock, during her life; and if at any time, or from time to time, by reason of insufficient income, or sickness or other exigency, more should be required, then I direct my said trustee to pay to her out of the principal of said trust fund whatever sum and sums of money may in his judgment

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be necessary or proper for her comfortable maintenance and support, even if the whole trust fund is taken for the purpose; but all such payments from the principal shall be first approved by the judge of the Probate Court for said county of Suffolk.

"3d. Upon the decease of my said wife, then to pay and convey in fee all the trust property, as it then exists, to my said brother, Charles Henry Hancock, if then living, but if he is not then living, then to convey the same in fee to his then heirs at law, whereupon this trust shall end."

Charles Henry Hancock, the testator's brother, whose domicil was in Minnesota, died on February 11, 1886, intestate and without issue, leaving as his only next of kin a sister, the first named defendant, and a widow, Lydia A. Nancy J., the wife of the testator, died on January 6, 1890, and the first named defendant and Lydia A., who meanwhile had married James W. George, both survived her. The trust property at the testator's death consisted of both real and personal estate, but the trustee under the power contained in the will sold the real estate in 1885, and the trust fund now amounts to $21,000.

Lydia A. George contended that she was an heir at law of Charles Henry Hancock at his death, and that she was entitled to share equally with the first named defendant in the distribution of the fund.

The first named defendant contended that she was the sole heir at law of Charles Henry Hancock, and that she was entitled to the whole of the trust fund.

E. Tappan, for the plaintiff, read the papers in the case.

J. N. Marshall, for Irene A. Clark.

C. Browne, (*J. H. Taylor* with him,) for Lydia A. George.

HOLMES, J. This is a bill for the construction of a clause in a Massachusetts will, which clause is the final disposition of a trust of the residue of the testator's estate, "real, personal, and mixed," and is as follows: "3d. Upon the decease of my said wife, then to pay and convey in fee all the trust property, as it then exists, to my said brother, Charles Henry Hancock, if then living, but if he is not then living, then to convey the same in fee to his then heirs at law, whereupon this trust shall end." The testator's widow is dead. Charles Henry Hancock died

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before the widow, and the question is who take as his "heirs at law." More specifically, the question is whether the whole fund goes to his sister, Irene A. Clark, or whether his widow, now Lydia A. George, is entitled to any, and what share.

The trust fund consisted of both real and personal estate at the time of the testator's death, and is contemplated as including land by the will. This fact, the use of the words "convey in fee," and the use of the similar phrase, "convey the same in fee to his then heirs at law," in the fifth article of the will, which deals only with land, show that "heirs at law" must be construed to mean those who would be entitled to succeed to real estate in case of intestacy. *Lincoln* v. *Perry*, 149 Mass. 368, 373. *Fabens* v. *Fabens*, 141 Mass. 395, 399. *Merrill* v. *Preston*, 135 Mass. 451. The facts that the trustee is to convey the property as it then exists, and that he had power to sell and had sold the land, are not sufficient to distinguish this from the foregoing cases, and to bring it within *White* v. *Stanfield*, 146 Mass. 424. *Codman* v. *Krell*, 152 Mass. 214. *Kendall* v. *Gleason*, 152 Mass. 457.

Charles Henry Hancock died domiciled in Minnesota, but it has been decided that the words under consideration must be taken to mean those who would be entitled by Massachusetts law to succeed to land in Massachusetts. *Lincoln* v. *Perry*, 149 Mass. 368. *Codman* v. *Krell*, 152 Mass. 214.

Again, the words mean those who would have been entitled if Charles Henry Hancock had died at the moment appointed for the conveyance, that is, at the death of the testator's widow, on January 6, 1890. The gift is to Charles Henry Hancock's "then heirs." The word "then" takes the case out of the general rule illustrated by *Dove* v. *Torr*, 128 Mass. 38, *Abbott* v. *Bradstreet*, 3 Allen, 587, and *Whall* v. *Converse*, 146 Mass. 345, and brings it within the exception established by *Knowlton* v. *Sanderson*, 141 Mass. 323, *Fargo* v. *Miller*, 150 Mass. 225, and *Wood* v. *Bullard*, 151 Mass. 324, 335. For, qualifying "heirs" as it does, it can only mean heirs ascertained as of that time.

It follows that we must look to the Pub. Sts. c. 124, § 3, in order to ascertain whether the widow of Charles Henry Hancock falls within the words of the will. If her husband had died intestate, and had left no issue living, she would have taken

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his real estate in fee to the amount of five thousand dollars. To that extent, at least, under our decisions, she is an heir at law. *Lavery* v. *Egan*, 143 Mass. 389. *Lincoln* v. *Perry*, 149 Mass. 368, 374. *McMahon* v. *Gray*, 150 Mass. 289, 290. *Novo jure fiunt heredes omnes qui ex senatus consultis aut ex constitutionibus ad hereditatem vocantur.* D. 5, 3, 3.

The fund is given as one whole to the heirs. Therefore, when it is settled that the widow is an heir, the will gives her a share in the whole fund, and not merely in such part as happened to be land at the testator's death. But we must look to the statutes of descent to determine the proportion which will come to her, as well as to discover whether she is one of the donees. "A devise to heirs designates not only the persons who are to take, but also the manner and proportions in which they take." *Rand* v. *Sanger*, 115 Mass. 124, 128. *Cummings* v. *Cummings*, 146 Mass. 501, 507. *Holbrook* v. *Harrington*, 16 Gray, 102, 104. *Houghton* v. *Kendall*, 7 Allen, 72, 77, 78. *Lavery* v. *Egan*, 143 Mass. 389, 393. *Bullock* v. *Downes*, 9 H. L. Cas. 1, 14, 22, 30. It is clear, then, that she takes five thousand dollars. Her right to that amount would have vested at once upon her husband's death, and would not have been devested by her subsequent marriage. See *Foster* v. *Fifield*, 20 Pick. 67, 70. But the fund is stated to amount to twenty-one thousand dollars, and the question remains whether she is "entitled during her life to one half of the other real estate," here represented by the rest of the fund, according to the further provision of the Pub. Sts. c. 124, § 3. The answer depends on whether she is to be regarded as an heir in respect of this life interest, as well as of what she gets in fee.

Undoubtedly there is nothing in the nature of things to prevent the inheritance, status, or estate of an ancestor being continued by more than one successively, as well as conjointly. When the inheritance descended to several persons as parceners, they were said to be but one heir to their ancestor. Y. B. 20 Ed. I. 200, 226. Littleton, § 241. Dyer, 29 a, pl. 194. In like manner, it was said that "he in the reversion, and the particular tenant, are but one tenant." *Brooker's case*, Godbolt, 376, 377. Co. Litt. 49 a, b, 143 a. Wingate's Maxims, 55, pl. 3 and 113. *Haynes* v. *Boardman*, 119 Mass. 414. The continuity of person

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or fictitious identification of heir and ancestor (*Day* v. *Worcester, Nashua, & Rochester Railroad*, 151 Mass. 302, 307, 308) is reconcilable with either form of internal subdivision. The *persona* is one, although the individuals sustaining it are different. It may follow from *Sears* v. *Sears*, 121 Mass. 267, that a widow in possession, claiming her statutory interest, would stand better for the purpose of acquiring a title by prescription or adverse possession by tacking the time of her adverse use or occupation to that of her husband, than one having only a right of dower unassigned was held to do in *Sawyer* v. *Kendall*, 10 Cush. 241. To that extent there might be sufficient privity or partial identification between them, as there is between vendor and purchaser. *Leonard* v. *Leonard*, 7 Allen, 277.

But, on the other hand, the notion of heir always has been that of one on whom the law casts an estate of inheritance immediately on the death of the owner. *Lavery* v. *Egan*, 143 Mass. 389, 392. Co. Litt. 7 b. The takers of the life estates heretofore created by the common law or by statute on the owner's death, such as dower, curtesy, or homestead, are not heirs. The life estate in question, although now given the widow by the same section of the Public Statutes which gives her the fee up to five thousand dollars, comes from a different statute, and is given with a different end. The fee is given her by the St. of 1880, c. 211; the life estate by the Gen. Sts. c. 90, § 15 (St. 1854, c. 406, § 1). The latter is a purely optional interest in lieu of dower, and is substantially equivalent to the "estate by the curtesy or other life interest," given the husband by the Pub. Sts. c. 124, § 1. In *Sears* v. *Sears*, 121 Mass. 267, the St. of 1854 is said to be a modification of the statute of descents. The suggestion was not necessary to the decision. But whether it be true or not of the first section, as no doubt it is of others, plainly the court did not regard the widow as an heir, inasmuch as they said that immediately on the death of her husband she becomes a tenant in common with his heirs. So, in the Pub. Sts. c. 124, § 10, a widow having an undivided life interest, by the provisions of law, is contrasted with the heirs; "if her right is not disputed by his heirs," the interest may be assigned to her, etc. Taking these considerations into account, and also that, so far as we know, the contrary was never argued in this case or any other,

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we are of opinion that we cannot extend the principle of *Lavery* v. *Egan* to the widow's life interest, and therefore that she takes only five thousand dollars. *Decree accordingly.*

MINER R. THOMAS & others *vs.* JOSHUA G. BEALS & others.

Suffolk. January 29, 30, 1891. — May 22, 1891.

Present: FIELD, C. J., W. ALLEN, C. ALLEN, HOLMES, & MORTON, JJ.

Equity — Setting aside Fraudulent Sale — Return of Purchase Money — Offer of Repayment in Bill — Interest.

Upon a bill in equity to set aside a sale by an assignee in insolvency of the property of the insolvent debtor, where, upon a full report of the evidence, there was evidence that the purchaser knew that the price paid by him was too small, it was *held* that the findings of the single justice who saw and heard the witnesses, that the sale was made for a grossly inadequate price in fraud of the creditors, and that the purchaser participated in the fraud, ought not to be disturbed; and the sale was set aside, with costs to the plaintiff.

If an assignee in insolvency sells property of the insolvent debtor under license of the Probate Court, and by collusion with the purchaser an inadequate price is received, the purchaser, upon the sale being set aside, is entitled to a return of the purchase money, and may be allowed interest from the date of payment, and is to be held chargeable with the profits, if any, received by him.

A bill in equity, brought by an assignee in insolvency for the insolvent's benefit, to set aside a collusive sale made by a former assignee, need not contain an offer to repay the purchase money, but the court may make the relief granted conditional upon such repayment.

BILL IN EQUITY, filed by assignees of an insolvent estate, to set aside a sale, made by one Loeser, a former assignee of the estate, of property of Edward Henshaw, one of the insolvent debtors. Hearing before *Knowlton*, J., who found that "the sale was made at a grossly inadequate price, and that Henshaw negotiated the purchase and made the arrangements for the purpose of preventing his creditors from having the benefit of the property, and of securing it for the benefit of himself and his children; that one of the purposes of Loeser was fraudulently to assist him in keeping the property from his creditors; and that the defendant Beals consented to become the purchaser in part, for the purpose of assisting Henshaw and Loeser to dispose

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of the property for the benefit of Henshaw and his family, and in fraud of Henshaw's creditors." The judge reserved the case, upon the pleadings, the facts found, and a full report of the evidence taken by a commissioner, for the consideration of the full court, such decree to be entered as law and justice might require. The facts appear in the opinion.

J. A. Maxwell, for the plaintiffs.

F. Paul, for the defendant Beals.

HOLMES, J. This is a bill by assignees in insolvency, brought to set aside a sale by the former assignee, Loeser, to the defendant Beals, of the interest of Edward Henshaw, one of the insolvents, in the real and personal estate of his wife, who died intestate. That estate consisted of Mrs. Henshaw's share in the estate of her father, George W. Simmons. The facts found and reported by the judge who tried the case disclose a sale in fraud of Henshaw's creditors, but we are asked to revise the findings on the evidence, which also is before us. It is only in a very clear and exceptional case that this can be done, when the court of first instance has seen and heard the witnesses. *Rau* v. *Von Zedlitz*, 132 Mass. 164. *Francis* v. *Daley*, 150 Mass. 381, 383. *Hodgdon* v. *Cummings*, 151 Mass. 293, 295. *Chase* v. *Hubbard*, 153 Mass. 91. We have examined the evidence with some anxiety, but do not find this to be such a case.

There was ample ground for finding that the former assignee, Loeser, sold with a fraudulent intent to get what he could, and to appropriate the proceeds as he did. The more doubtful part of the case concerns the intent of Beals, the purchaser. It well might be found that he intended to save the interest for the insolvent, and that he thought it worth more than the price paid, $1,000, if held for the insolvent. But there is a question whether he can be taken to have supposed that the price was less than could be got at a fair sale. The report states that it was agreed that the property of George W. Simmons was worth the amount at which it was appraised, and that the real estate was appraised at $255,560 above the encumbrances. If the statement of the appraisal is correct, there can be no doubt about the correctness of the finding. But it appears from a part of the testimony which seems not to have been controverted, which was merely an abstract of the documents in evidence, and which, if we were

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to conjecture, we should think it likely that the judge must have believed, — an assumption rarely possible to be made, — that the above mentioned sum of $255,560 was subject to encumbrances of $116,433. Other evidence, which it seems almost equally likely was deemed credible, shows other elements of reduction and uncertainty in what Beals bought, sufficient to raise a doubt whether a larger price could have been expected from a sale in the market.

On the other hand, if the judge who tried the case should adhere to his report, upon the supposed mistake being called to his attention, we should not be able to say that he was wrong, and as no motion to recommit the report was made before us, we hardly are warranted in assuming that as it stands it does not represent his deliberate opinion. Again, we cannot say that the evidence does not warrant a finding that the property was worth a good deal more than it was likely to sell for to an outsider, and that Beals knew what it was worth, and possibly more unfavorable inferences. Taking into account the dangerous nature of the transaction, we are disposed to think that the judge was right in not allowing it to stand, although we are not inclined to attribute morally culpable motives to Beals.

The defendant Beals seemingly does not much object to the sale being set aside, if he receives back the price which he paid, and the main question is whether that shall be made a condition of the decree. The sale to him was not a sale by the insolvent himself, and therefore is not within the Pub. Sts. c. 157, §§ 96, 98, as to preferences, etc. Even such a sale is only voidable. *Freeland* v. *Freeland*, 102 Mass. 475, 477. *Morgan* v. *Abbott*, 148 Mass. 507, 508. Neither was it void because the schedule of Henshaw's property did not disclose the property in question at the time when the license to sell was granted to Loeser. The license was formally complete and adequate. If it was induced by suppression of facts on the part of Loeser, that would go only to the motives for decision, not to the form of the judicial act, and therefore only would make the decree voidable, not void. See *Fairbanks* v. *Snow*, 145 Mass. 153, 154. Moreover, it seems that the requirements of the Pub. Sts. c. 157, § 50, as to how the assignee shall sell, are merely directory. *Tuite* v. *Stevens*, 98 Mass. 305, 307. *Crowley* v. *Hyde*, 116 Mass. 589, 590.

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The only ground on which the sale can be attacked is, that although in form it correctly pursued a valid license, yet in fact it was fraudulent as against creditors. But the only fraud to which Beals was even constructively a party was the giving and taking of an inadequate price. He had no notice of Loeser's intent to misappropriate the proceeds. Loeser was the proper person to receive them, and when they came to his hands they were at home as between Beals and the creditors. Such a transaction is not within the letter or the spirit of the Pub. Sts. c. 157, §§ 96, 98, where the effect and intent of the transaction is to keep both property and proceeds from being distributed according to law. See *Tapley* v. *Forbes*, 2 Allen, 20, 25. Therefore the case stands on the ordinary footing of a voidable sale, and the avoidance must be mutual if it is to be ordered. If Beals had conveyed the property to a *bona fide* purchaser, he only would be bound to make good the excess of value over the sum already received by the creditors, with interest. *Morse* v. *Hill*, 136 Mass. 60, 71. As they require him to restore the property, they must restore to him the price.

We also are of opinion that Beals should be allowed interest on the money paid by him. The plaintiffs stand in the position of having had the use of the money since he paid it over. On the other hand, Beals has had no use of, or profit from, his purchase, and whatever gain may have accrued upon it will go back to the hands of the plaintiffs. By way of further precaution, Beals may be ordered to account for any profits which he may have received up to this date. *Eastman* v. *Simpson*, 139 Mass. 348, 350. *Upshaw* v. *Debow*, 7 Bush, 442, 448. See 2 Seton's Decrees, (4th ed.) 1353, decree in *Tate* v. *Williamson*, L. R. 2 Ch. 55. If interest is allowed, it must be allowed from the date of Beals's payment. See *Richards* v. *Todd*, 127 Mass. 167, 173; *Warren* v. *Tyler*, 81 Ill. 15, 19.

There was no necessity for an offer to return the consideration before the bill was brought. A bill in equity is not like an action at law, brought on the footing of a rescission previously completed; for instance, to replevy a horse which was obtained by a fraudulent exchange, and to which the plaintiff has no right unless he has restored what he has received. *Thayer* v. *Turner*, 8 Met. 550. The foundation of this bill is that the

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rescission is not complete, and it asks the aid of this court to make it so. It is objected that at least the bill ought to offer restitution. We are aware that in many cases an offer to do equity has been held necessary. But in the case at bar the court has power to impose equitable conditions upon the relief granted the plaintiffs. And it is hardly, if at all, conceivable that this decree in any event could be for the relief of the defendant alone against the plaintiffs, as in the case of an account, where, nevertheless, an offer is no longer necessary. *Goldthwait* v. *Day*, 149 Mass. 185. The plaintiffs, by seeking to set aside the conveyance, have elected to adopt all the consequences of rescission. Whether, in view of these considerations, any offer is necessary in the bill, we need not decide. The plaintiffs certainly have a right to try the question whether they ought to pay anything, and it is enough for them to offer, as they do, to repay the price if the court finds it to be due.

We see no sufficient reason for varying the general rule that the costs should follow the event. *Decree accordingly.*

COMMONWEALTH *vs.* HENRY S. BROWN.

Middlesex. February 2, 1891. — May 22, 1891.

Present: FIELD, C. J., W. ALLEN, C. ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Intoxicating Liquors — Illegal Transportation — Aiding and Abetting.

An employee of an express company, which is engaged in the illegal transportation of intoxicating liquors to a no license city, may himself be convicted of that offence, if after their arrival in the city he aids in forwarding them to their destination therein, having reasonable cause to believe that the same were intended to be sold there in violation of law, although he had no personal knowledge that the particular liquors had been ordered or were coming until they reached the company's city office, and did not himself bring, or manually aid in bringing them into the city, and could not have prevented their transportation there.

COMPLAINT under the Pub. Sts. c. 100, § 17, alleging that Henry S. Brown of Lowell, on September 8, 1890, did bring into the city of Lowell, "in which said city licenses of the first five

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classes described in section ten of chapter one hundred of the Public Statutes of said Commonwealth were not then granted, certain intoxicating liquor, to wit, sixty-one gallons of lager beer, twenty-two gallons of ale, and five gallons of whiskey, he, the said Henry S. Brown, having then and there reasonable cause to believe that the same was intended to be sold in violation of the laws of said Commonwealth in said city of Lowell."

At the trial, on appeal, in the Superior Court, *Pitman*, J. refused to make certain rulings requested by the defendant, and, after a verdict of guilty, the defendant alleged exceptions, which appear in the opinion.

The case was argued at the bar in February, 1891, and afterwards, in April following, was submitted on the briefs to all the judges.

W. I. Badger, for the defendant.

A. E. Pillsbury, Attorney General, (*C. N. Harris*, Second Assistant Attorney General with him,) for the Commonwealth.

MORTON, J. The defendant in this case was charged with bringing into the city of Lowell certain intoxicating liquors, having reasonable cause to believe that the same were intended to be sold in said city, in violation of law. It was agreed at the trial that the city of Lowell granted no licenses at the time named in the complaint. It is well settled that one who aids another in committing a misdemeanor is equally guilty with one who actually commits it. *Commonwealth* v. *Drew*, 3 Cush. 279. *Commonwealth* v. *Ray*, 3 Gray, 441. *Commonwealth* v. *Gannett*, 1 Allen, 7. *People* v. *Erwin*, 4 Denio, 129. *United States* v. *Gooding*, 12 Wheat. 460, 475, 476. *Regina* v. *Greenwood*, 16 Jur. 390. And this rule has been applied in this State to statutory offences arising under the liquor law, so called. *Commonwealth* v. *Galligan*, 144 Mass. 171, 173. *Commonwealth* v. *Murphy*, 145 Mass. 250. In the present case, there was no testimony directly connecting the defendant with the transportation of the liquors which he was charged with bringing into the city of Lowell. The next question is whether there was any evidence tending to show that he aided or abetted in any way in bringing them into that city; and we think there was such evidence.

The defendant was the agent in Lowell of the New England

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Despatch Company, which was a common carrier between Boston and Lowell and other places. He drove one of the wagons in Lowell, and hired and had charge of the other drivers there. In the ordinary course of the business of the company, some of the goods carried by it to Lowell were received and transported in the following way. Customers in Lowell wrote their orders, which were enclosed in sealed envelopes directed to certain parties in Boston, and sent or brought them to the company's office in Lowell. Sometimes the defendant took them, and sometimes others in the office, but generally the cashier. These orders were put into a messenger's box in the office, and were taken by the messenger to Boston, and there delivered to the various parties to whom they were directed. Another person, a driver in the company's employ at Boston, called at the various places for the goods thus ordered, and collected and delivered them to the baggage master of the Boston and Maine Railroad, who placed them in the baggage car, under the charge of one of the company's Lowell messengers, and on the way to Lowell they were checked off by the messenger on the way bills accompanying the goods. Neither the defendant nor any of the employees knew the contents of the orders, and the way bills did not describe the contents of the packages. When the goods arrived at Lowell they were delivered to the employees of the company, of whom the defendant was one, and they delivered them to the parties ordering them.

The liquors in question were brought into Lowell by the company in the ordinary course of business, as thus described, but the defendant had no personal knowledge that they had been ordered or were to be received at Lowell till they were in the company's office at Lowell, and none of the other employees at the Lowell office knew of it till the messenger checked off the packages containing them, after the train had left Boston. There was evidence tending to show that a part of the liquors described in the complaint were marked "B Club," and that the defendant told one of the government witnesses that liquors marked "B Club" were to be delivered to such persons in Lowell as should be designated by a man named Bartlett in Lowell; and a short time prior to September 8, 1890, the day named in the complaint, liquors marked "B Club," on the boxes

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of which were the company's tags, had been found in places in Lowell where liquors were illegally sold. There was also evidence that the defendant knew, or had reasonable cause to believe, that a portion of the liquors in question were intended to be sold in Lowell, in violation of law, and that the express company had previously brought intoxicating liquors into Lowell with such knowledge, or with reasonable cause to believe that it was to be so sold. It also appeared that the defendant had been before cautioned by police officers at Lowell not to deliver liquor to illegal dealers therein, and had replied that he was not doing different from other express companies, and was not doing as much as some of the others. It further appeared, that teams under the defendant's direction had been delivering liquors constantly since the first of May previous, and he stated in the course of his testimony that he had to see that things went on right; that he had charge of the teams and drove some himself; that he first took charge after the goods reached Lowell; and that he meant by the reply above referred to that he was not bringing so much beer as the rest of the companies.

Upon this evidence, it was clearly competent for the jury to find, as they must have found under the instructions * of the

* These instructions were as follows: "The first question is whether the liquors in question, or some of them, were brought into the city of Lowell in violation of this statute; that is, brought with the intent to have the same sold by another, or having reasonable cause to believe that the same was intended to be sold in violation of law. If the jury are satisfied beyond a reasonable doubt that they were so brought, the next question is, Is the defendant liable? It is a well settled general principle of law that all persons who either commit a misdemeanor or knowingly and voluntarily aid, abet, assist, or encourage the commission thereof by any subordinate or collateral acts, are equally guilty as principals. I am not aware of any evidence in this case which directly connects the defendant with the bringing of this liquor into the city of Lowell, — any evidence directly connecting him. There is evidence tending to show that it was so brought by the New England Despatch Company, and that the defendant was the Lowell agent of the said company. Exactly what his service was has been put in evidence by himself. He called himself an agent, and the precise duties are to be settled upon testimony. It may not be precisely important, but it will show what the limit of his authority is; that, however, alone would not establish his liability. If nothing else appeared, the jury would be bound to return a verdict of not guilty. The defendant would not be responsible, either, for a casual violation of the statutes in which he had not knowingly participated.

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court, that the despatch company undertook the business of transporting intoxicating liquors to Lowell indiscriminately as a general and habitual practice, where they knew or had reasonable cause to believe that the same were intended to be used in violation of law. And the jury must have further found, as they were also justified in doing under the instructions of the court, that the defendant knew that such was their course of business, and knowingly assisted and aided in the same by his own acts, and that the liquors in question, or a part of them, were brought into Lowell in pursuance of such general course of business in which the defendant so participated, and were in fact illegally transported, and that the defendant formed a necessary part of the machinery in carrying on this illegal business. The defendant's first request, therefore, that upon the evidence he could not be convicted, was properly refused.

The defendant cannot excuse himself on the grounds set up in his remaining requests for rulings which were refused, namely, that he was not guilty unless he himself brought the liquors into Lowell or controlled the persons who did, or if the persons who brought it in were under the direction and control of the Boston superintendent of the company, or if the liquors were brought into Lowell in the ordinary course of business without his knowledge, and it was beyond his power to regulate

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But if the jury are satisfied that the despatch company, through its appropriate officers and agents, for its own lucre and gain, undertook the business of transporting intoxicating liquors to Lowell indiscriminately, and as a general and habitual practice to transport such liquors where they knew or had reasonable cause to believe that the same were intended to be sold in violation of law, and the defendant knew that such was their course of business and knowingly assisted and aided in the same by his own acts, and these liquors, or any part of them, were brought into the city of Lowell in pursuance of such general scheme or course of business which the defendant so participated in, and these liquors were in fact so illegally transported, then he may be held liable therefor; that is to say, if he voluntarily went in and aided and encouraged a general business of transporting intoxicating liquors, then he is liable for specific acts of this kind because he aided and participated in the business which led to the taking of such goods. If he performed any necessary part of the machinery in carrying on this illegal business, then he became a participator in the business, and would be liable for acts done in the usual and ordinary course. It is for you to say whether this case, by the evidence, is brought within the law. If he was participating in the business, then he is answerable for the whole doing of the business."

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or control the goods shipped to Lowell from Boston or other places. When the liquors arrived at Lowell he knew, or had reasonable cause to believe, that they were intended for sale in Lowell in violation of law. He had reason to know from the course of the business that they had been brought to Lowell from Boston, pursuant to an order from a dealer in Lowell to a dealer in Boston. And he knew that, when they arrived at Lowell, both the shipper in Boston and the orderer in Lowell expected that he would aid in forwarding them to their destination in Lowell. He himself expected to do this, and to do it as one step in the transportation from the vendor in Boston to the purchaser and illegal seller in Lowell. In the strict sense of the words, therefore, he was aiding in bringing into Lowell intoxicating liquors with reasonable cause to believe that they were to be there sold in violation of law. He was one link in the chain of transportation from the shipper in Boston to the illegal seller in Lowell, and he knowingly and voluntarily occupied that position. It was not necessary that he should know at every moment and every step what every one else did who was engaged in aiding, or abetting, or committing the misdemeanor. So far as he was concerned, all that was necessary was that it should appear that he knowingly aided in the commission of the misdemeanor charged. If he did, he was liable. *Regina* v. *Swindall*, 2 C. & K. 230. For these reasons, a majority of the court think that there was no error in the instructions, and that the defendant's requests were rightly refused.

Exceptions overruled.

JOHN M. POWERS *vs.* CITY OF BOSTON.

Suffolk. March 6, 9, 1891. — May 22, 1891.

Present: FIELD, C. J., C. ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Personal Injuries — Defect in Highway — Street Railway — Contributory Negligence.

It is not necessary that an obstruction in a highway should endanger all modes of public travel in order to be a defect; it is enough that it makes any mode dangerous which the public has a right to use.

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In an action against a city by a street car conductor, injured in the evening by a collision with a barrier put up to guard a point where a street had caved in, a witness testified that the danger from the caving in had ceased the morning before. The jury, in connection with an instruction that they might find the barrier to be a defect if such a change had occurred as to render its removal proper, were allowed to decide whether the witness meant that the danger to the public had ceased because the barrier had been put up, or because a further caving in was not to be feared so that it was no longer necessary. *Held*, that the question was properly left to the jury.

The plaintiff at the time of the accident stood upon the running board of an open car collecting fares, and, his person, which he allowed to project beyond the outer edge of the board, coming in contact with the barrier, which was placed within two inches of such outer edge, he was knocked off and sustained the injuries in question. He admitted that he had a general idea that there were some obstructions there, but testified that he did not know they were so near or so dangerous as they were. *Held*, that the question of the plaintiff's negligence was properly left to the jury.

The accident happened at a little after sunset on September 7, and there was evidence that it was misty. Both the plaintiff and a passenger on the car testified that they did not notice any lights on the barrier. *Held*, that the questions whether it was dark, and whether the barrier was lighted, were properly left to the jury.

TORT for personal injuries occasioned to the plaintiff by an alleged defect in Washington Street in the defendant city. At the trial in the Superior Court, before *Staples*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which, so far as material to the points decided, appear in the opinion.

W. S. B. Hopkins & C. T. Davis, for the defendant.

A. Hemenway & C. S. Knowles, for the plaintiff.

HOLMES, J. This is an action to recover damages for personal injuries alleged to have been caused by a defect in a highway. The plaintiff was a conductor of a street car, and at the time of the accident was standing on the running-board of an open car, collecting fares, when he was knocked off and injured by being carried against a post planted in the highway within two inches of the edge of the running-board. The post was part of a barrier which had been put up as a guard where the street had caved in because of an excavation for a new building at the corner of Court Street and Washington Street.

On the question whether the barrier was a defect, the jury were instructed, in substance, that if the barrier as it stood was reasonably necessary to protect the public at the time of the accident, and if its position was indicated by sufficient lights, it

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was not a defect, no matter how near it came to the railroad track; but that if it was not necessary, if it was carried too far into the street, if it was constructed so as to be a danger to public travel rather than a safeguard, the jury might find it to be a defect; or if the danger had been ended long enough reasonably to have enabled the posts to be removed, then it was a defect. These instructions are not much questioned as abstract propositions, and in our opinion they were correct. It is true that, under the circumstances supposed, the barrier might not be a defect as towards people travelling on foot or in carriages, and that it might be one relatively to the street cars only by reason of its nearness to the track and their inability to turn out. But it is not necessary that a matter complained of should endanger all modes of public travel in order to be a defect. It is enough that it makes any mode dangerous which the public have a right to use. The ground is, not that street cars have greater rights than the public at large, but that travel by means of the street cars is one of the rights of the public at large. See *Gregory* v. *Adams*, 14 Gray, 242, 247; *Arey* v. *Newton*, 148 Mass. 598.

It is objected, however, that the instructions given allowed the jury to find that there had been such a change as to make it proper to remove the barrier, whereas in fact there was no such evidence. The question turns on the meaning of a witness, the inspector of buildings, in testifying that on Saturday morning the danger from the caving in had ceased, — the accident having happened Saturday evening. It was left to the jury to say whether he meant that the danger to the public had ceased because the posts had been put in as a protection against it, or because the danger of a further caving in of the street was over, so that the barrier was no longer necessary. Whatever we might have thought if all the language used by this witness had occurred in a written deposition, we cannot say that his words may not have admitted of two interpretations by those who heard them, and therefore we find no error here.

An exception is taken to leaving the question of the plaintiff's negligence to the jury. So far as the ruling requested rested upon the plaintiff's knowledge, it is to be observed that, while he admitted that he had a general idea that there were some

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obstructions there, he said that he did not know that they were so near to the car or so dangerous as they were. No doubt, if a man voluntarily runs into a danger which he fully appreciates, in common cases he cannot recover for it, and it is rather a question of words than of substance whether he shall be called negligent, or shall be said to have taken the risk. *Miner* v. *Connecticut River Railroad*, 153 Mass. 398. But a man does not take the risk of every danger which may arise from certain causes merely because, in a general way, he is aware of the existence of those causes. *Thomas* v. *Western Union Telegraph*, 100 Mass. 156, 158. *Barton* v. *Springfield*, 110 Mass. 131. *Dewire* v. *Bailey*, 131 Mass. 169. *Lawless* v. *Connecticut River Railroad*, 136 Mass. 1, 5. *Ferren* v. *Old Colony Railroad*, 143 Mass. 197, 199. *Kelly* v. *Blackstone*, 147 Mass. 448, 451.

So far as the request for a ruling that the plaintiff was negligent was put upon the ground that he was standing on the running-board and allowed his person to project beyond the outer edge of the board, there can be no doubt, we think, that the question would be left to the jury in an action against the railroad company. *Meesel* v. *Lynn & Boston Railroad*, 8 Allen, 234. *Fleck* v. *Union Railway*, 134 Mass. 480. *City Railway* v. *Lee*, 21 Vroom, 435. *Geitz* v. *Milwaukee City Railway*, 72 Wis. 307. *Dahlberg* v. *Minneapolis Street Railway*, 32 Minn. 404. *Dickinson* v. *Port Huron & Northwestern Railway*, 53 Mich. 43. *Germantown Passenger Railway* v. *Walling*, 97 Penn. St. 55. *West Philadelphia Passenger Railway* v. *Gallagher*, 108 Penn. St. 524, 528. It is true that in such an action the plaintiff has the advantage that the defendant invited the conduct which it now alleges to have been negligent, but the reasoning of the cases is not wholly dependent upon this fact, and the same conclusion has been reached in actions against third persons in cases of collision. *Spofford* v. *Harlow*, 3 Allen, 176. *Connolly* v. *Knickerbocker Ice Co.* 114 N. Y. 104. There are many things to be considered in deciding upon the character of the plaintiff's conduct, and we cannot say that it seems to us so plainly negligent that the question should have been taken from the jury.

The only other point which is argued for the defendant is, that the judge sent the case to the jury in such a way that they may have found for the plaintiff on the ground that, although

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the barrier necessarily was placed and left where it was, it was not lighted, and a light was necessary at the time of the accident, whereas, it is said, there is no evidence that it was dark or that there were no lights. But there was some evidence for the plaintiff on both points. The accident happened at or a little after sunset on September 7, and there was testimony that it was misty. The plaintiff and a passenger testified that they did not notice any lights. *Johanson* v. *Boston & Maine Railroad*, 153 Mass. 57. Without considering more nicely what would constitute a *prima facie* case entitling the plaintiff to go to the jury, we are of opinion that a new trial must be denied, and we reach the matter the more readily in view of the fact that the defendant did not ask a ruling that there was no evidence that the barrier was not lighted, and that the exception to the charge did not call the attention of the judge or the opposing counsel to the points now relied upon except in a very indirect way. *Exceptions overruled.*

COMMONWEALTH *vs.* GEORGE W. MESERVE & another.

Suffolk. March 30, 1891. — May 26, 1891.

Present: C. ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Indictment — Conspiracy — False Pretences — Evidence — Witness — Variance — Exceptions.

An indictment alleging that the defendants M. and F. had unlawfully conspired with K. to defraud a corporation named out of certain building material, under the color of a pretended contract made between K. under the assumed name of B. and the corporation for furnishing the same and putting it into a building for K., and upon his credit under such name, by means of the false pretences to be made to the corporation by M. that K. was B., a man of wealth, and under that name was erecting a building, which he owned with the land under it, and needed such material therefor, and that K. under that name had given him, M., authority to make the contract on his behalf and under that name with the corporation, and intended to pay for such material and for putting in the same whenever the payment for the same should become due. *Held*, that the charge was of a conspiracy to obtain goods under the color of a contract between K. and the corporation, in which K. should pretend to be B. and should assume that name to be his own, and in which various other pretences were to be made in reference to the supposed B.; and that the indictment was sufficient.

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It is within the discretion of the presiding judge at a trial to permit a leading question to be put to a witness in direct examination.

Upon the trial of an indictment for a conspiracy to obtain goods by means of a contract, to be fraudulently made by one K. under the assumed name of B., it is competent, for the purpose of establishing K.'s real name, to show that shortly before the alleged conspiracy he was married under the name of K., that he was usually known as K. or as St. C., and that his wife, while thereafter living with him, and before the date of the conspiracy, bore the surname St. C.

The erroneous admission of testimony in support of one count of an indictment, upon which the accused is acquitted, is not ground of exception.

The inability of a witness to read writing does not necessarily render him incompetent to testify to the identity of a written paper.

Upon the trial of an indictment for conspiracy, evidence of certain acts which took place several months subsequent to the date of the alleged conspiracy were *held* to be properly excluded.

Upon the trial of an indictment alleging a conspiracy to obtain goods by false pretences to be made by one K., to the effect that his name was B. and that he lived in a certain town and owned real estate there, residents of that town may testify that they know of no such person, although no one of them can state that he knows every resident in the town.

At such trial, an old resident of the town, who testifies that he is the register of deeds and town clerk, having the custody of the town records and assessors' books, and is familiar with them and with the people and land in the town, and that he is also a real estate agent and conveyancer, and has searched the records a good deal, may testify that no person of the above description owns real estate in the town, although he has not made special search with reference to testifying.

At the trial of an indictment against M. and F., for a conspiracy with K. to cheat under color of a contract to be fraudulently made by K. under the assumed name of B., evidence that K's. wife made a statement to F's. wife respecting the latter's husband in his absence, and that K. had written letters to a woman surnamed B. who was not a witness and whose relation to him was not shown, is incompetent.

A count charging a conspiracy to obtain goods by different indictable false pretences is supported by evidence of a conspiracy to cheat by some one of those pretences.

If an averment in an indictment is of a conspiracy to obtain certain goods, proof of a conspiracy to obtain goods and labor is no variance.

If a party makes no specific requests for instructions, a general exception to specified portions of the charge will not be sustained, unless some substantial error or injustice clearly appears.

Expressions in the rulings of the judge presiding at a trial, which standing alone might be the subject of exceptions, are to be qualified and interpreted by other rulings made in connection with them that would render such expressions unexceptionable.

INDICTMENT in five counts for a conspiracy to obtain goods by false pretences. The third count alleged that the defendants, "George W. Meserve and Nathaniel W. Foye, both of said Boston, together with one Samuel S. Kennedy, otherwise called

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Samuel Kennedy, otherwise called Samuel Saint Clair, now deceased, being evil disposed persons, and wickedly devising and intending to cheat and defraud the Shreve, Crump, and Low Company, a corporation duly established and existing, on the first day of April in the year of our Lord one thousand eight hundred and eighty-nine, at Boston aforesaid, did unlawfully conspire, combine, confederate, and agrée together falsely, knowingly, designedly, and fraudulently to cheat and defraud the said corporation out of a large quantity of property, goods, wares, and merchandise, of the property of the said corporation, that is to say, a large quantity of gas-pipe and gas-piping of great value, to wit, of the value of twenty-five dollars, under the color of a pretended contract between said Kennedy as and under the name of George Brown and said corporation, for furnishing and putting into a certain building hereinafter mentioned, by said corporation, said gas-pipe and gas-piping, for said Kennedy, and upon his said Kennedy's credit as and under the name of George Brown as aforesaid, by means of the false and fraudulent pretences thereafter to be made to said corporation by the said Meserve; that said Kennedy was one George Brown, who was a man of wealth and opulence residing in said Exeter, in the State of New Hampshire; that said Kennedy, as and under the name of George Brown as aforesaid, was constructing and erecting a building in that part of said Boston called East Boston, and was in need of gas-pipe and gas-piping for use in the constructing and erection of said building; that said Kennedy, as and under the name of George Brown as aforesaid, had given him, said Meserve, authority to make a contract, for and on behalf of said Kennedy, as and under the name of George Brown as aforesaid, with said corporation, for the furnishing and putting into said building by said corporation such gas-pipe and gas-piping; that said Kennedy, as and under the name of George Brown as aforesaid, was the owner of the said building and the land whereon said building stood; and that said Kennedy, as and under the name of George Brown as aforesaid, then intended to pay for the said gas-pipe and gas-piping and the putting in of the same, whenever the payment for the same became due."

The fifth count alleged that the defendants, "George W. Me-

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serve and Nathaniel W. Foye, both of said Boston, together with one Samuel S. Kennedy, otherwise called Samuel Kennedy, otherwise called Samuel Saint Clair, now deceased, being evil disposed persons, and wickedly devising and intending to cheat and defraud one Job F. Bailey, on the second day of May, in the year of our Lord one thousand eight hundred and eighty-nine, at Boston aforesaid, did unlawfully conspire, combine, confederate, and agree together falsely, knowingly, designedly, and fraudulently to cheat and defraud the said Bailey out of a large quantity of goods, wares, and merchandise of the property of said Bailey, — that is to say, a large quantity of doors, windows, blinds, window-frames, and sash, to wit, sixty-three window-frames each of the value of three dollars, sixty-six doors each of the value of four dollars, fifty-four windows each of the value of three dollars, divers sash each of the value of one dollar, — under color of a pretended purchase of and from said Bailey of said property, goods, wares, and merchandise by said Kennedy, upon the credit of said Kennedy as and under the name of George Brown, by means of the false and fraudulent pretences thereafter to be made to said Bailey by said Meserve, Foye, and Kennedy, that said Kennedy was one George Brown, a man of wealth and in opulent circumstances, who then resided in Exeter, in the State of New Hampshire; that said Kennedy, so to be represented as George Brown as aforesaid, was the owner of real estate in said Exeter, of great value, to wit, of the value of between fifteen thousand dollars and twenty thousand dollars; that he, said Kennedy, so to be represented as George Brown as aforesaid, had recently theretofore sold seven thousand dollars' worth of real estate of him, said Kennedy, so to be represented as George Brown as aforesaid, in said State of New Hampshire, and had invested the proceeds thereof in property in said Boston; that said Foye was the agent of said Kennedy, so to be represented as George Brown as aforesaid, for the erection and construction of certain buildings in divers parts of said Boston and elsewhere in said Commonwealth; and that said Kennedy, so to be represented as George Brown as aforesaid, then intended to pay for said property, goods, wares, and merchandise, so falsely and fraudulently to be purchased and obtained as aforesaid, upon the credit of him, said Kennedy, as

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and under the said name of George Brown, within thirty days after the delivery thereof."

At the trial in the Superior Court, before *Mason*, C. J., the jury returned a verdict of guilty against Meserve alone on the third count, and against both defendants on the fifth count, and of not guilty on the first and fourth counts; and the defendants alleged exceptions, which, so far as material to the points decided, appear in the opinion.

E. Avery & G. R. Swasey, for the defendants.

A. E. Pillsbury, Attorney General, (*C. N. Harris*, Second Assistant Attorney General with him,) for the Commonwealth.

C. ALLEN, J. The defendants were tried on four counts, the first, third, fourth, and fifth. Meserve was convicted on the third and fifth counts, and Foye on the fifth only. The objections urged are to the validity of the indictment, to the evidence, and to the instructions of the judge.

The motion to quash the third count rests on the ground that it is uncertain and vague, and that the defendants could not tell from it whether they were to be tried for a conspiracy to obtain goods by making an unauthorized contract for goods and labor, and also by means of false pretences, or whether they were to be tried for a conspiracy to obtain goods by means of a pretended contract for goods and labor, which said contract was to be obtained by false pretences. It appears to be sufficiently plain that the count charges a conspiracy to obtain goods under color of a contract between Kennedy and the corporation, in which Kennedy should pretend to be Brown; the name of Brown was to be pretended or assumed by Kennedy to be his own; and various other pretences were to be made in reference to the supposed Brown. The count is sufficient. *Commonwealth* v. *Walker*, 108 Mass. 309.

The objection to the fifth count is substantially similar.

Numerous objections were taken to the admission or exclusion of evidence, only a part of which are now insisted on.

The defendants contend that a question put on direct examination to the government witness, Amanda A. Kennedy, was leading. The objection was not put on that ground at the trial, and if it had been it was within the discretion of the presiding judge to allow it. *Green* v. *Gould*, 8 Allen, 465. *York* v. *Pease*, 2 Gray, 282.

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It was competent to show that Kennedy, alias Brown, was married shortly before the conspiracy charged under the name of Kennedy, and that he usually went under that name, or the name of St. Clair, and also that his wife while living with him shortly before the time of the alleged conspiracy went under the name of Mrs. St. Clair. All this would have some tendency to show that the assumption of the name of Brown was a mere pretence, and that the agreement that he should assume that name for the purpose of obtaining goods on credit was a conspiracy to cheat.

The evidence of Meserve's conversation as to an attempt to get a horse in Dublin, New Hampshire, was given in connection with a conversation about a plan for Meserve and Kennedy to go to New Hampshire to get some brick by cheating somebody there. This testimony was in support of the first count, and had no relation to the third or fifth counts, on which alone a conviction was had. The jury having acquitted the defendants on the first count, the admission of this evidence, whether right or wrong, is now immaterial.

The judge might properly hold that the written documents testified to by Mrs. Kennedy were sufficiently identified to be laid before the jury, although she was unable to read. The mere fact that a witness cannot read writing does not necessarily render him incompetent to testify to the identity of a written paper. He still has the size, form, color, and general appearance of the paper, the color of the ink, and the size and general characteristics or appearance of the writing, to go by. For example, one might be allowed to testify to the identity of a paper written in Greek, Hebrew, Sanscrit, or Egyptian hieroglyphics, although unable to read a word of either language. The weight of the testimony would of course be for the jury.

The testimony of the witness Googin, which was excepted to, was offered under a misapprehension as to what her testimony would be, and this was stated as soon as she had answered the questions. The testimony was not injurious in its nature, and there is no reason to suppose that it prejudiced the defendant Meserve.

The witness Reed was asked on cross-examination whether his action with reference to foreclosure was influenced by an inter-

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view with Mr. Pratt. This action with reference to foreclosure and the interview referred to were several months after the date of the conspiracies charged in the indictment, and the question might properly be excluded as immaterial.

The evidence that the lumber sent to Newton Highlands was marked "George Brown," for a building which Foye was erecting there, had a tendency to show that Kennedy was then assuming the name of Brown, and that Foye was cognizant of it. It bore directly upon the charge against Foye, and was competent for this purpose, although it may not have borne upon the charge against Meserve. Moreover, this testimony appears to have had relation only to the first count, upon which the defendants were acquitted.

The question to the witness Carpenter, "What talk did you have with him?" — that is, with Brown, — was properly allowed. There had been sufficient evidence of a conspiracy between Meserve and Kennedy, alias Brown, to warrant the judge in admitting declarations by the latter. No objection was taken to any particular part of the answer, on the ground that it related to matters outside of the charges in the indictment.

The witness Stark was asked on cross-examination for certain particulars as to the purchase of the Porter lot, so called, and of the building contract for that lot. These particulars were properly excluded as immaterial. That purchase was several months before the transactions which are charged in the indictment. The fact that there was no attempt by Meserve to defraud in reference to that purchase and that building contract, if conceded, would be unimportant; if not conceded, the admission of the evidence would raise an issue of itself traversable and foreign to those on trial. Moreover, it does not appear that it was urged against either of the defendants that there was an overvaluation in the original purchase of the Reed lot by Meserve from Reed. There was no occasion to prove affirmatively that the price paid was reasonable.

The questions to the residents of Exeter were competent. One principal element in the alleged conspiracy being that Kennedy should assume to be George Brown, a man of wealth, residing in Exeter, and then or recently an owner of real estate there, it was competent to show by the witnesses that they

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knew of no such man. The witnesses testified to a general acquaintance with the inhabitants and owners of real estate in that town. It was not necessary that each witness should be able to state absolutely that he knew every resident. The witness Belknap testified that he was an old resident of the town, the registrar of deeds, the town clerk, having custody of the town records and assessors' books, and that he was familiar with them; that he was also a real estate agent and conveyancer, and had searched the records a great deal. He might properly be allowed to testify that there was no such owner of real estate in Exeter as George Brown; that is, no person of that description. The point was that no man of that name and description lived there. The question of his means was held by the court to be immaterial. The only practicable way in practice to prove that no deed appears of record is to show that an examination of the records discloses none. The court and jury cannot look through the records for themselves. The evidence of the witness might not be entitled to so much weight as if he had made special search with reference to testifying; but his general statement, founded not only upon his familiarity with the records, but upon his knowledge of the people and of the land of the town, might properly be received. The authorities cited to show that facts which appear of record must be proved by the records, or by copies thereof, are not applicable to show that oral testimony is inadmissible to show that a particular fact does not appear of record.

The statement of Mrs. Kennedy, alias Brown, to Mrs. Foye, that "Tom will fix him," (referring to one Eldridge, a man hired by Foye,) was properly excluded. We see no ground on which it was material or important, it having been said in the absence of the person referred to. It would have no tendency to contradict him, or affect his testimony.

The price that Porter was willing to accept for building the house on the Reed lot was properly excluded; or, if material in any aspect of the case, it could only be with reference to counts upon which no conviction was had. In the third and fifth counts, there was no charge which would make it material. At the time of the conspiracies therein charged, the title was in Brown. A proposed building contract between Meserve and

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Porter, and Porter's uncompleted negotiation for building, do not in any way tend to negative the charges of subsequent conspiracies, as set forth in the third and fifth counts.

It was immaterial to show that Kennedy, alias Brown, wrote letters while in the state prison to a person called Flora Brown. She was not herself called as a witness. No evidence was offered to show that there was any relationship between them, and the fact of his writing letters to a woman called Flora Brown would of itself have no tendency to show that his true name was Brown.

The other exceptions taken at the trial in respect to the admission or exclusion of evidence are not now insisted on.

The ground of exception which appears to be most strongly relied on is, that the judge instructed the jury, in substance, that where an indictment charges a conspiracy to obtain goods by various different false pretences, it will not be a variance if it is proved that there was a conspiracy to obtain the goods by any one of the false pretences which are set out. This instruction was given in reference to the first count; but assuming that it was also applicable to the third and fifth counts, on which alone a conviction was had, we are of opinion that it furnishes no valid ground of exception.

It is conceded in the argument for the defendants, that, in an indictment for obtaining goods by false pretences, the government is not held to proof of all the pretences alleged. See cases cited in 2 Bish. Crim. Proc. §§ 165–171. But if there is no variance in such case, it certainly would savor of great refinement to hold that there is a variance when the indictment charges a conspiracy to obtain the goods by several false pretences, and only one is proved. The ground taken in argument is, that in the latter case the agreement between the conspirators is not proved as laid. But the means by which the cheating is to be accomplished are not necessarily to be held to be indivisible. The specification of them is required in our practice, in cases where the purpose itself of the alleged conspiracy is not criminal or unlawful, in order that it may appear that the means contemplated to carry it out are criminal or unlawful. According to the practice in England, as we gather from the course of the decisions, it is not necessary to set out the contemplated

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means for effecting the cheat. *Rex* v. *Gill*, 2 B. & Ald. 204. *Regina* v. *Gompertz*, 9 Q. B. 824. *Sydserff* v. *Regina*, 11 Q. B. 245. *Latham* v. *Regina*, 5 B. & S. 635. But in order to give needed information to the court and to the defendant, where there is merely a general charge of a conspiracy to obtain goods by false pretences, a specification of particulars is ordered by the court, if moved for. *Regina* v. *Kenrick*, 5 Q. B. 49, 61. *Rex* v. *Hamilton*, 7 C. & P. 448. *Regina* v. *Brown*, 8 Cox C. C. 69. In Massachusetts, as in others of the United States, it is held that this information should be given in the indictment, in cases where the purpose of the conspiracy itself does not appear to be criminal or unlawful; and that this rule applies to conspiracies to cheat, as cheating is not necessarily criminal or unlawful. *Commonwealth* v. *Hunt*, 4 Met. 111. *Commonwealth* v. *Eastman*, 1 Cush. 189, 224–227. *Commonwealth* v. *Shedd*, 7 Cush. 514. *Commonwealth* v. *Wallace*, 16 Gray, 221. In the case last cited, the reason given is that it enables the court to see the character of the acts proposed to be done in the accomplishment of the purpose of the intended conspiracy, and also apprises the defendant of the facts relied upon to constitute the offence with which he is charged. No case is cited or has come to our notice where it has ever been held that it is a variance if some of these contemplated means are not proved as alleged, provided any criminal or unlawful means which are alleged are proved. At *nisi prius*, in England, it was held that a charge of a conspiracy "to prevent the workmen of the said J. G. from continuing to work" was well supported by evidence of a conspiracy to prevent one workman. *Rex* v. *Bykerdike*, 1 Mood. & Rob. 179. So also, that a charge of a conspiracy by false pretences to extort money was supported by evidence of a conspiracy to extort money without reference to the false pretences. *Regina* v. *Yates*, 6 Cox C. C. 441. Also, that if an act is charged to have been done with several intents, proof of one is enough. *Rex* v. *Evans*, 3 Stark. N. P. C. 35. We think the substance of the issue is sufficiently proved by proving any one of the pretences laid, provided such pretence would be sufficient if it alone had been charged. The mentioning of the various false pretences is rather a matter of enumeration than of essential description, and those pretences not proved to have been contemplated may be rejected in the indictment.

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There certainly was evidence tending to support the averment as to a part of the pretences set forth in the third and fifth counts, and that is enough.

The defendant Meserve further contends that the averment in the third count was of a pretended contract with the Shreve, Crump, and Low Company, which did not bind Brown. We do not so understand it. The averment means, a contract which it was pretended was between a man by the name of George Brown and the corporation, when the contract in fact was between Kennedy and the corporation.

It is also urged that there was a variance because the averment was of a conspiracy to obtain goods, whereas the proof, if anything, was of a conspiracy to obtain goods and labor. But this is no variance. *Veazie's case*, 7 Greenl. 131.

It is further contended that there was no evidence to connect Meserve with the fifth count. If there was evidence of a conspiracy to obtain certain goods by cheating some one, it would take but slight additional evidence to show that Bailey was the one intended. There was a good deal of evidence tending to show that it was the purpose of Meserve and Foye to obtain goods of that kind; and there was evidence tending to show that Meserve offered to settle Bailey's claim by submitting to a loss. This objection would be proper to be considered on a motion for a new trial, but on exceptions we cannot say that there was no evidence for the jury.

We now come to the criticisms made by the defendants upon the judge's charge to the jury.

The first criticism is not well founded. It is, that the court so framed its language that the jury must have been led to think that the inquiry for them was whether a pretence was in fact made that Kennedy was Brown, and not whether there was an agreement to make a false use of that name. But conspiracy may be proved by circumstantial evidence, and proof of what was actually done is evidence tending to show what was agreed to be done. The judge had already fully and clearly instructed the jury as to the proper effect of proof of acts done, and there is no reason to suppose that the jury were under any misapprehension. The defendant now contends that the jury should have been instructed, in substance, that if Kennedy had gone by the

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name of Brown before, and had not assumed the name of Brown in this particular instance for fraudulent purposes, such assumption and representation would not be a false pretence. In reference to this, it is enough to say that no such instruction was asked for at the trial.

The same remark applies to other criticisms. No specific instructions were asked for, provided the case was to go to the jury. The judge's attention was not called to any particular defect or insufficiency or inaccuracy in his instructions to the jury, but at the close of the charge the defendants enumerated twenty different portions of the charge to which they excepted, embracing all the four counts which were submitted to the jury, but with no further specification of what they complained of, or wherein they wished for different rulings. Now, in such a case, if any fundamental error in principle is discovered, or anything by means of which it seems probable that injustice may have been done, the defendants should have the benefit of it. But under such circumstances it would hardly conduce to a due administration of justice to search out opportunities for making minute verbal criticisms of the language of the charge, or to look for omissions to say all that might properly have been said. It is incumbent on a defendant who takes his exceptions in this manner, without having made any specific requests for instructions, and without calling the attention of the court to the points relied on further than to allege a general exception to the specified portions of the charge, to make it plain that there has been some substantial error. But we find nothing of the kind in the case before us. Indeed, even after argument, some of the criticisms are difficult to be understood. We discover no exception to the charge as to the third count, which we think ought to be sustained.

In the fifth count, one of the false pretences set forth as contemplated in the alleged conspiracy was, that "Kennedy, so to be represented as George Brown as aforesaid, had recently theretofore sold seven thousand dollars' worth of real estate . . . in said State of New Hampshire, and had invested the proceeds thereof in property in said Boston." The judge instructed the jury that this was good if proved as charged. The ground of objection urged by the defendants is, that this was a representation or pretence as to Kennedy's means or ability to pay, which

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must be in writing under the Pub. Sts. c. 203, § 59. The judge had already instructed the jury fully, in reference to the first count, that pretences that he was rich, that he owned real estate in New Hampshire, that this real estate was valuable, and that he was interested in the manufacture of bricks in New Hampshire, were of such a character that they must be in writing; but that a representation that he was shifting his property from New Hampshire to Massachusetts might have another aspect, and that it might be found to be equivalent to a representation that he was so engaged in such transactions that he had occasion for the goods which he sought to obtain. The instruction now objected to was in effect a brief repetition of what had been said before in reference to the various pretences set forth in the first count, and must have been understood as subject to the same qualifications which had already been fully explained. The pretence in question was not merely a pretence as to Brown's means or ability to pay, but it was a pretence which might well be considered to relate to the situation of the property, and his purposes in reference to it, so as to be relevant to the alleged conspiracy to cheat.

Exceptions overruled.

MEMORANDUM.

ON the fourth day of June, 1891, the Honorable WILLIAM ALLEN died at his residence in Northampton, having held the office of an Associate Justice of this Court from the fifth day of September, 1881.

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BERTHA BADENFELD *vs.* MASSACHUSETTS MUTUAL ACCIDENT ASSOCIATION.

Suffolk. January 13, 1891. — June 10, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, & MORTON, JJ.

Accident Insurance — Arbitration — Condition Precedent — Burden of Proof.

Under the proviso in a certificate of insurance against bodily injuries, that "no suit or proceeding at law or in equity shall be brought to recover any sum herein, unless the same has been first referred to the arbitration of just and competent men," such an arbitration is not a condition precedent to a right of action upon the certificate.

In an action upon a certificate of membership in an accident association, containing provisos that "members are required to use all due diligence for personal safety and protection," and that no claim should be made under the certificate "when death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger," the burden of proof is on the defendant to show that the assured did not use such due diligence, or that he did thus expose himself to such danger.

At the trial of an action upon such a certificate, there was evidence that the assured before ten o'clock A. M. was waiting in a railroad station to take a train leaving at a quarter past ten from track No. 7; that on the adjoining track No. 8, next the wall of the building, stood a train which he knew left at ten; that between these tracks was a platform for the use of passengers taking and leaving trains; that outside of track No. 8 and next the wall was a narrow platform overhung by the train and cut into by girders projecting from the wall, intended for the use of train hands, though sometimes used by passengers; and that just after the ten o'clock train had started, the body of the assured was found on track No. 8 next to the edge of the outside platform, in such a situation and condition as showed that he had been run over by the train and instantly killed. There was no evidence of the cause of his fall or of his acts proximate to his death. The presiding judge refused to rule that, if the assured was on the outside platform or leaving the train while it was in motion, a defence was made out, on the ground that the assured did not use due diligence, or had voluntarily exposed himself to unnecessary danger. *Held*, that the defendant had no ground of exception.

CONTRACT, by the administratrix of the estate of Charles Badenfeld, to recover five thousand dollars on a certificate of membership in the defendant association issued to the intestate, who was the husband of the plaintiff. The certificate contained, among other provisions not material, the following: "In the event said member shall sustain during the continuance of his membership bodily injuries effected through external, violent, and accidental means, within the meaning of the conditions

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herein recited, and such injuries alone shall have occasioned death within ninety days from the happening thereof, then we agree to pay to his wife, Bertha Badenfeld, if surviving, or, if not surviving, to his heirs or legal representatives, five thousand dollars, . . . provided always, First, members are required to use all due diligence for personal safety and protection. . . . Fifth, . . . no claim shall be made under this certificate . . . when death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger. . . . Ninth, no suit or proceeding at law or in equity shall be brought to recover any sum herein, unless the same has been first referred to the arbitration of just and competent men."

At the trial in the Superior Court, before *Pitman*, J., it appeared in evidence that the intestate came to his death in the train-house of the Boston and Lowell Railroad Station in Boston, on December 26, 1888. It was admitted that there had been no reference to arbitration of the plaintiff's claim, either as regards the amount thereof, or as to the question of the liability of the defendant; and that the plaintiff had never requested such arbitration.

There was evidence that the intestate came into the train-house at about half past nine o'clock on the morning of the day of the accident; that in this train-house were numerous parallel tracks for passenger trains, with platforms between extending out of the train-house to the north; that the most easterly track was called track No. 8, and the track next westerly, and separated from it by a platform, was called track No. 7; that between track No. 8 and the easterly wall of the train-house was a platform, over which a car standing on the track would extend about six inches; that projecting from such easterly wall were iron girders twenty-five feet apart and supporting the roof, which rendered this platform of varying width, being about five and a half feet in the clear between the edge of the same and the wall itself, but only about two and a half feet where the girders projected into the platform, thus leaving a space of about two feet only between the side of a passenger car standing on the track and the face of the girders; that this platform was intended for the use of train hands, and not for that of passengers, though sometimes used by the latter; that the platform

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intended for the use of passengers, and which was generally used by them in getting upon or in alighting from cars standing on track No. 8, was the platform between that track and track No. 7.

There was further evidence that the intestate came into the train-house alone, and inquired of the gateman at one of the gates through which passengers went in going to and from the cars, respecting the trains for East Cambridge, and was told that the next train for that point left at a quarter past ten from track No. 7; that he at the same time showed the gateman a ticket for a single passage between Boston and East Cambridge; that the quarter past ten train had not yet backed into the train-house, and the only train then standing in the train-house was one standing on track No. 8, which was due to leave at ten o'clock A. M.; that the intestate, upon being told that the train then standing on track No. 8 left at ten o'clock, asked the gateman whether that train did not stop at East Cambridge, and was told that it did not; that the intestate then proceeded to walk about the train-house, and up and down the platforms between the tracks, and was last seen by the gateman at about a quarter before ten o'clock, when the intestate accosted him; that the ten o'clock train was made up of two passenger cars, the forward one of the two being a smoking car; that upon the departure of the ten o'clock train, and as soon as the rear end of the rear car had passed along, the gateman saw the intestate lying dead upon track No. 8, his head lying upon the westerly or left hand side of the more easterly rail nearly severed from the body, and the rest of the body crowded in between that side of the rail and the edge of the outside platform; that at the time the train started, the intestate was not upon the rear platform of the smoking car, or upon either platform of the rear car; and that, as this train stood in the station, the forward platform of the smoking car was about twenty feet from the point upon the track where the body of the intestate was found. There was no evidence that the intestate was seen by any one after he spoke to the gateman, about a quarter before ten o'clock, and no evidence of the cause of his falling upon the track and in front of the car wheels, which passed over him and occasioned his death.

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At the close of the plaintiff's evidence, and also at the close of the defendant's evidence, the defendant requested the judge to nonsuit the plaintiff, on the ground that, there having been no arbitration or request for arbitration, the present action could not be maintained; but the judge refused to do so, and the defendant excepted. The defendant also requested the judge, at the close of all the evidence, to direct a verdict for the defendant, which the judge also refused to do, and the defendant excepted. The defendant also requested the judge to give the following instructions to the jury:

"1. That, upon all the evidence in the case, the plaintiff is not entitled to maintain the present action. . . .

"3. That if the jury find that the deceased, while on the platform on the right of track No. 8, fell, or was struck by the moving train and knocked under the car, the plaintiff is not entitled to recover in the present action.

"4. That if the jury find that the deceased attempted to get off the train while in motion, and in so doing fell or was knocked under the car, then the plaintiff is not entitled to maintain the present action.

"5. That if the jury find that the deceased, while being on the platform above mentioned, had a fit or illness of any kind and fell under the car, then the plaintiff cannot recover in the present action.

"6. That the deceased, in being on the platform in question, was not using all due diligence for personal safety and protection.

"7. That if the jury find that this platform on the right of track No. 8 was obviously not intended for the use of passengers, and was obviously a dangerous place, then the deceased was not in the exercise of all due diligence for personal safety and protection; and if the jury find that the deceased, while being on such platform, by reason of illness or otherwise, fell or was struck by the moving train and knocked under the car, then the plaintiff cannot recover in the present action.

"8. That if the jury find that the deceased voluntarily placed himself in a position of danger, and his death occurred in consequence thereof, the plaintiff cannot recover."

The judge refused to give these instructions, but instructed the jury, among other things, as follows:

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"Did the deceased meet his death in a careless way? that is, with a lack on his part of due diligence? Of course that renders it necessary to discuss somewhat and to apply the law somewhat to hypothetical cases." The judge then read the defendant's seventh request. "I cannot give you that instruction in the way in which it is asked. I cannot rule to you, as matter of law, that the finding of the party upon that platform, whatever you may think of the situation of the platform, or its use or intended use, necessarily, as matter of law, proves that the party was not in the exercise of due care. Of course, if you find that that platform was not intended and not prepared for the use of passengers, and did not present any invitation to passengers, and was obviously a dangerous place, then the law would impose upon him a different measure of care when he was in such a dangerous place than the rule of due diligence would impose upon him if he was in a safe place, and it may be that the jury would be justified in finding, if he was there unnecessarily and improperly, with no excuse or reason for being there, that that act constituted a lack of proper care. But, on the other hand, I cannot say that you may not find in the case — it is not for me to say whether you can or cannot — reasons or excuses for his being there which would be consistent with the exercise of due care in being in that place, notwithstanding the contingencies and dangers named in the prayer. I must therefore leave that to you upon this consideration." The judge then read the eighth request of the defendant. "I give you that instruction, with this qualification: 'If the deceased voluntarily placed himself in a position of danger, without any reasonable excuse therefor, then the plaintiff cannot recover.' The other prayer which I shall give you [the fourth] relates to his leaving the train, upon the suggestion that he left the train while it was in motion; and the law upon that matter I may as well give in the exact language of the Supreme Court." The judge then quoted the opinion in *Gavett* v. *Manchester & Lawrence Railroad*, 16 Gray, 501, 507, beginning at the words, "It cannot be doubted," and ending with the words, "evidence of carelessness"; and then proceeded: "It will be for you to say, if you reach this part of the case, whether the defendant, upon all the evidence and upon all the circumstances of the case, has satisfied you, as in other

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civil cases, so that you can feel that degree of assurance that you would act upon in a business matter, — has made it so probable that you would say, speaking in a business way, that you were satisfied that the deceased was not in the exercise of due diligence. Of course, you are not required to be sure of it, but only to be satisfied by a fair preponderance of the evidence. If it is left in such a state that you cannot be satisfied, then the defendant has failed in its attempt to make out that defence. To recapitulate. You will first determine whether this is a case of accidental death, or a case of suicide, the burden being upon the plaintiff in that. If you decide that in favor of the plaintiff, you will then decide whether the deceased was in the exercise of due diligence; or rather, more exactly, whether the defendant has proved that he was not in the exercise of due diligence. If you find either of these propositions as the defendant contends, then the defendant is entitled to your verdict; if you find them both as the plaintiff contends, then your verdict will be for the plaintiff for the amount which I have indicated."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

F. E. Snow, for the defendant.

A. A. Ranney & J. Woodbury, for the plaintiff.

By the Court. This opinion, prepared by Mr. Justice William Allen, was approved by the court in his lifetime.

The promise of the defendant was to pay a certain sum in the event of the death of the plaintiff's intestate, occasioned by "bodily injuries effected through external, violent, and accidental means."

There are nine provisos in the certificate, the last of which is, that "no suit or proceeding at law or in equity shall be brought to recover any sum herein, unless the same has been first referred to the arbitration of just and competent men." It was admitted that there had been no reference to arbitration of the plaintiff's claim, and that the plaintiff never requested such arbitration. The first exception is to the refusal of the court to rule that, for that reason, the action could not be maintained. The promise is, not to pay the award, but to pay the sum named, and the proviso does not make the award a condition

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precedent to the promise to pay, but a mode of enforcing that promise. It is well settled that such an agreement is no bar to an action on the promise. *Reed* v. *Washington Ins. Co.* 138 Mass. 572, and cases cited.

The certificate also contains the provisos, that "members are required to use all due diligence for personal safety and protection," and that "no claim shall be made under this certificate . . . when the death or injury may have happened in consequence . . . of any voluntary exposure to unnecessary danger." These provisos constitute matter of defence, and the burden of proving them is upon the defendant. *Freeman* v. *Travelers' Ins. Co.* 144 Mass. 572. The other exceptions are to the refusals of the court to rule upon the undisputed evidence in the case, and upon the hypothetical findings of the jury upon the evidence, that the defence of want of due diligence or of voluntary exposure to unnecessary danger by the deceased was made out, and to instruct the jury to find a verdict for the defendant.

After the ten o'clock train left, the dead body of the plaintiff's intestate was found on the track where the train had stood, in such a situation and condition as showed that he had been run over by the train and instantly killed. Track No. 8 was the easterly track, and was near the easterly wall of the train-house. A platform extended from the wall toward the track so far that a car upon the track would overhang the platform about six inches. The distance from the wall to the edge of the platform was about five and a half feet, but there were girders extending inward from the wall about three feet, so that the distance from the face of the girders to the edge of the platform was about two and a half feet. There was evidence tending to prove that the plaintiff's intestate, before ten o'clock in the forenoon, was waiting in the train-house of a railroad station in Boston to take a train that left at a quarter past ten on track No. 7, and that he knew that a train left on track No. 8 at ten o'clock.

The defendant contended, and there was evidence to prove, that the platform east of the tracks was intended for the use of the train hands, and not for passengers, though it was sometimes used by them, and that the place intended for and generally used by passengers for taking and leaving cars on track

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No. 8 was the platform on the westerly side of that track, between it and track No. 7.

The supposition that the deceased fell in attempting to get on or off any platform of the cars while they were in motion, seems inconsistent with the evidence. The only theory of accidental injury consistent with the evidence seems to be that the deceased was thrown or fell from the platform east of the cars upon the rail between the front and rear trucks of the forward car, about the time the cars started, and before they had moved twenty feet. There was no evidence of the cause of his fall, and it cannot be contended that the mere fact that he fell under the car is a defence. The real contention of the defendant, expressed in different forms in its prayers for instructions, is that the mere fact that the deceased was in a dangerous place, (on the platform east of the track,) or, as stated in one prayer for instructions, doing a dangerous act, (leaving a car while it was in motion,) is, as matter of law, conclusive proof that he did not use all due diligence for personal safety and protection, and that he voluntarily exposed himself to unnecessary danger.

This is not an action against the railroad company in which the mutual rights and duties of a person injured and the company are involved.

As regards the defendant, the deceased had a right to go upon the platform, and to examine the wall of the building, and the girders, and the platform, and the cars standing upon the track, and to enter and leave them. None of these acts would of itself be evidence of want of due diligence for personal safety, or of voluntary exposure to unnecessary danger. Any of them might be done carefully or carelessly. The manner and circumstances of the act would give character to it.

The facts that the deceased was upon the platform, and that he was injured in the manner shown, clearly do not constitute negligence in law, or afford conclusive evidence of negligence.

The defendant asked for instructions upon the hypothesis that the deceased fell while leaving the car when it was in motion. There was no evidence that he so fell, but, if it could be inferred, it would not be conclusive of his negligence. That would depend upon the circumstances, and there would be no presump-

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tion that the circumstances were such as to make it negligent. If the jury could surmise that he left the car when it was in motion under circumstances which rendered the act negligent, they could equally well surmise that he left it under circumstances which would show that the act was not negligent. It may be said, in general, in regard to each of the defendant's prayers for rulings and instructions, that there is no evidence of the act of the deceased proximate to his injury, and of course no evidence of the circumstances which characterize the act as negligent or otherwise. If the jury infer an act, they are not, without evidence, at liberty to infer the circumstances which made the act negligent. The jury could not properly base their verdict upon particular facts found without evidence. The real question was whether the facts directly proved by the evidence, and those to be inferred from them, sustained the burden of proof which was upon the defendant, and this was clearly a question for the jury and not for the court, unless the court could rule that there was not sufficient evidence. The instructions given were sufficiently favorable to the defendant.

Exceptions overruled.

MEMORANDUM.

ON the eighteenth day of June, 1891, the Honorable JAMES MADISON BARKER, one of the Justices of the Superior Court, was appointed a Justice of this Court, in place of Mr. Justice William Allen, deceased, and took his seat upon the bench on the twenty-sixth day of the same month, at a session of the full Court then held at Boston in the county of Suffolk.

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PATRICK J. McGUINNESS *vs.* PHILIP SHANNON.

Worcester. March 20, 1891. — June 25, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Written Contract — Oral Agreement.

In an action to recover a balance due for building a house for a fixed price, under a written contract which did not require the plaintiff to do the papering, the defendant sought to deduct a sum paid by him for doing the same under a new agreement, which he contended became a part of the written contract; but the only evidence thereof was his testimony that he told the plaintiff, after the execution of the contract and before they separated, that "there was on the back of the paper, written on with pencil, there was fifty dollars to be allowed for papering," and that the plaintiff said he understood it. *Held*, that the alleged agreement was to be treated as an oral agreement made substantially at the same time, which was inconsistent with the written contract and could not have the effect to vary it.

CONTRACT to recover a balance due under a building contract. Trial in the Superior Court, before *Blodgett*, J., who ruled, against the defendant's objection, that a certain claim of the defendant could not be sustained upon evidence introduced by him, and directed the jury not to consider it; and, after a verdict for the plaintiff, the defendant alleged exceptions. The nature of the claim and the evidence appears in the opinion.

F. A. Gaskill, for the defendant.

W. A. Gile, for the plaintiff.

ALLEN, J. The plaintiff built a house for the defendant for a fixed price, under a written contract and specifications which did not require him to do the papering; and he now sues to recover the balance due therefor. The defendant seeks to deduct fifty dollars, that being the sum paid by him for papering the house. To sustain this claim of deduction, he offered evidence tending to show that on the day when the contract was executed, and before the parties separated, the plaintiff orally agreed to do the papering also, or to allow the defendant fifty dollars for doing it. The defendant now contends that there was some evidence that this new agreement became a part of the written contract; but there is nothing to support this contention except the defendant's testimony that he told the plaintiff, "There was

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on the back of the paper, written on with pencil, there was fifty dollars to be allowed for papering," and the plaintiff said he understood it. There is nothing to show that the writing itself, if any there was, was before the court, or what the words written really were. The whole effect of the defendant's testimony is merely that the plaintiff agreed to the new provision orally, and not that it was mutually understood that a new clause, written on the contract, should be deemed to be incorporated into it as a part of the written contract. We cannot think that this view, which is now suggested in argument, was presented to the judge at the trial, especially as no copy of the memorandum is furnished and the defendant's testimony itself is so very vague. Indeed, looking at it narrowly, he did not even testify that there was in fact such a memorandum, but only that he told the plaintiff that there was. It must therefore be treated merely as an oral agreement, which was inconsistent with the written agreement, and was made substantially at the same time, and it cannot have the effect to vary it. It was not an alteration of the written contract by a subsequent new oral agreement between the parties, and in this respect it closely resembles *Clark* v. *Houghton*, 12 Gray, 38, 41. See also *Doyle* v. *Dixon*, 12 Allen, 576; *Fitz* v. *Comey*, 118 Mass. 100; *Frost* v. *Brigham*, 139 Mass. 43. *Exceptions overruled.*

WILLIAM RAND *vs.* HATTIE F. HANSON.

Essex. November 5, 1890. — June 25, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Judgment recovered in another State — Service — Agreed Statement — Inference of Fact — Practice.

The presumption in favor of the validity of a judgment rendered in another State does not extend to a case where it appears from the record that the defendant was not a resident of that State, and it does not appear that service of process was made on him there.

An order of notice, issued by the Supreme Court of New Hampshire, recited that the defendant in an action brought therein was not a resident of that State, and

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directed service upon him by publication, or by giving him a copy in hand, or by leaving it at his last and usual place of abode; and the officer's return thereon recited that he gave to the defendant such a copy, but did not disclose where he did so. In an action brought here on a judgment subsequently recovered there, an agreed statement of facts, which contained a stipulation that inferences of fact might be drawn, recited only that the order was served "either in New Hampshire or Massachusetts," without more. *Held*, that it did not appear that there was service of process on the original defendant in New Hampshire, and that the judgment must be treated as invalid.

It seems that, if it is desired to present to the full court the question of law whether an agreed statement of facts will warrant a particular inference of fact, it can best be done by an exception taken at the hearing.

CONTRACT, against the administratrix of the estate of Sarah E. Hanson, on a judgment recovered against the intestate in New Hampshire. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, in substance as follows.

On October 25, 1877, the plaintiff, a resident of Rochester, New Hampshire, began an action in the Supreme Court of that State against the intestate, who was a resident of Haverhill in this Commonwealth, by a writ returnable to the February term of 1878 of that court. The intestate was not in New Hampshire at the date of the writ, or between that date and fourteen days before the return day. The return upon the writ recited an attachment of all the real estate in Rochester, "in which the within named defendant has any right, title, interest, or estate," but at the time of the alleged attachment the intestate had no estate in New Hampshire except an unassigned right of dower in certain land in that town. The writ was duly entered, and during that term the court issued an order of notice, which, after reciting the declaration and the attachment, and the absence of personal service on the intestate, "she not being a resident of this State at the time of the service thereof," directed the plaintiff to give notice to the intestate of the pendency of the action, by publication, or by giving a copy of the order containing the substance of the declaration to her in hand, or by leaving it "at her last and usual place of abode" within a time limited. The officer's return upon this order recited that he "gave to the within named defendant a copy of the within declaration and order," without more. This order was personally served upon the intestate, either in New Hampshire or in Massachusetts, and no other

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service was made upon her, and she did not appear in the action either personally or by attorney. Subsequently the plaintiff recovered judgment against her, no part of which has ever been paid or satisfied. The agreed statement of facts contained the following: "It is agreed that the court may draw proper and competent inferences of fact from the above agreed facts."

If the plaintiff was entitled to recover, judgment was to be entered for him for a sum agreed; otherwise, judgment was to be entered for the defendant.

The case was argued at the bar in November, 1890, and afterwards was submitted, on the briefs, to all the judges except *Barker*, J.

W. H. Moody, for the defendant.

I. E. Pearl, for the plaintiff.

KNOWLTON, J. The judgment rendered against the defendant's intestate by the Supreme Court of New Hampshire was void for want of jurisdiction, unless a proper process was served on her in that State. *Eliot* v. *McCormick*, 144 Mass. 10. *Needham* v. *Thayer*, 147 Mass. 536. *Pennoyer* v. *Neff*, 95 U. S. 714. *Eaton* v. *Badger*, 33 N. H. 228. There is a presumption in favor of the regularity of the proceedings of any court of general jurisdiction. *Bissell* v. *Wheelock*, 11 Cush. 277. *Stockwell* v. *McCracken*, 109 Mass. 84. But it is always a good defence against a suit brought on a judgment recovered in another State, to show that the defendant was not a resident of that State, and that no proper service was made on him there. The presumption in favor of the validity of a judgment does not extend to a case where it appears from the record that the defendant was a non-resident, and it does not appear that service of process was made upon him within the State. *Downer* v. *Shaw*, 22 N. H. 277. *Morse* v. *Presby*, 25 N. H. 299. In *Galpin* v. *Page*, 18 Wall. 350, it is said that "where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the jurisdiction of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

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The facts agreed by the parties, and the facts disclosed by the record itself, show that the court had no jurisdiction of the defendant's intestate when the order of notice was issued at the February term in 1878. The record showing that there was no jurisdiction without a service of this order upon her in New Hampshire, the question arises whether the agreed statement shows that the order was served there, or whether there is any evidence in the case which, under the stipulation in the agreement that the court may draw inferences of fact, would warrant the Superior Court in making a finding to that effect. Unless this question can be answered in the affirmative, the judgment must be for the defendant. The order of notice directed a service, either by publication, or by giving a copy in hand to the original defendant, or by leaving it at her last and usual place of abode. It did not require or contemplate a personal service in the State of New Hampshire, but treated a service by leaving a copy at her place of abode in Massachusetts, or by giving it in hand to her there, as of equal effect with a personal service within the jurisdiction of the court.

The fact that the order was served, "either in New Hampshire or Massachusetts," has no tendency to prove that it was served in New Hampshire rather than in Massachusetts. The return of the officer, that he gave the defendant a copy, is entirely silent in regard to the place where the copy was put into the possession of the original defendant, and it has no affirmative force in favor of the proposition which must be established before the judgment can be treated as valid. Nothing is agreed upon outside of the record from which an inference of fact can be drawn in regard to the place where the service was made, and there is nothing in the record itself which furnishes a foundation for such an inference. If the order of notice called for a service within the State, there might be a presumption of regularity in favor of the service, although the language of the return was as consistent with a delivery of the copy in Massachusetts as in New Hampshire. But the order assumed that no personal service within the jurisdiction was necessary to the judgment which was contemplated, and it would have been complied with as well by leaving a copy at the place of abode of the original defendant in Haverhill, or by deliv-

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ering it to her in hand there, as by a personal service in New Hampshire.

We find nothing in the case to make the stipulation in the agreed statement, that the court may draw inferences of fact, of any importance. Upon the material point there is nothing but the question what is the true legal construction of a record, which is always a question of law for the court. We therefore have no occasion to determine whether we should further approve the practice which has sometimes been permitted of presenting to the court certain agreed facts as a case stated, accompanied by a stipulation that the court may draw any proper inferences of fact, and then asking the full court to treat, as a question of law apparent on the record, the question whether the facts agreed will warrant an inference of fact that will support the judgment appealed from, on the assumption, without proof, that the court below drew the strongest inferences of fact possible in favor of the result reached. It is clear that such a statement is not like a special verdict, and is not a proper case stated, because it can never be known from the record whether the court below drew any inferences of fact or not. If it is desired to present to the full court the question of law whether the facts agreed will warrant a particular inference of fact, it can best be done by an exception taken at the hearing. See *Hovey* v. *Crane*, 10 Pick. 440; *Commonwealth* v. *Cutter*, 13 Allen, 393; *Charlton* v. *Donnell*, 100 Mass. 229; *Keegan* v. *Cox*, 116 Mass. 289; *Atlantic National Bank* v. *Harris*, 118 Mass. 147; *West* v. *Platt*, 120 Mass. 421; *Powers* v. *Provident Institution for Savings*, 122 Mass. 443; *Fitzsimmons* v. *Carroll*, 128 Mass. 401; *Old Colony Railroad* v. *Wilder*, 137 Mass. 536; *Mayhew* v. *Durfee*, 138 Mass. 584; *Hecht* v. *Batcheller*, 147 Mass. 335, 339.

In deciding the case on the ground that the plaintiff has failed to show that service was made in New Hampshire, we do not intimate that the court there had jurisdiction, in the absence of a valid attachment of property, to issue a process requiring the defendant to answer in that State, or that the judgment would be good if service of the order had been made there.

Judgment for the defendant.

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GLOUCESTER ISINGLASS AND GLUE COMPANY *vs.* RUSSIA CEMENT COMPANY.

Essex. November 5, 1890. — June 25, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Contract — Restraint of Trade — Public Policy — Failure of Consideration — Specific Performance — Adequate Remedy at Law.

An agreement between manufacturers, for the purpose of avoiding competition and regulating prices, respecting a valuable product not of prime necessity or a staple commodity, manufactured by both by the same process out of a nearly worthless material of which there is a limited supply, is not void as against public policy.

An agreement between manufacturers, an important part of the consideration of which is a compromise of litigation respecting the infringement of a patent supposed by them to be valid, which is entered into for the purpose of avoiding competition and contains mutual covenants as to the mode of conducting their business, will not, on a bill for specific performance of the agreement, after a partial performance of the same and upon the patent's proving invalid, be treated so far as it is executory as void for want of consideration, where the parties, after discovering the invalidity of the patent, by their conduct affirm and renew the agreement.

If the non-performance by one of the parties to an agreement between manufacturers, who are both engaged in producing an article from material of which the supply is limited, will result in a continuing injury leading to difficulties in the management of the other's business, and possibly to its destruction, by depriving him of the share of such material to which the agreement entitles him, the latter has no adequate remedy at law, and specific performance will not be denied him on that ground.

Specific performance of a contract, which has been varied in the execution of its details by a common understanding and mutual consent, may be decreed with such variation, if the rights of the parties are clear under the modified agreement.

BILL IN EQUITY, for the specific performance of an agreement between the plaintiff and the defendant. Hearing before *Knowlton*, J., who reported the case for the consideration of the full court, such decree to be entered as law and equity might require. The facts appear in the opinion.

The case was argued at the bar in November, 1890, and afterwards, in June, 1891, was submitted on the briefs to all the judges, except *Barker*, J.

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C. Browne, for the plaintiff.

P. E. Tucker & C. H. Drew, for the defendant.

KNOWLTON, J. The plaintiff and the defendant corporations, which had been engaged in litigation with each other as to the alleged infringement of a patent owned by the plaintiff, supposing the validity of the patent fully established, and believing that they would be able practically to control the profitable manufacture of fish glue, entered into a contract with each other by which the defendant was to pay a certain sum for damages, and one half of the costs of the suits, and was to be allowed the use of the patent. Each party was to conduct its own establishment, and they were to unite in the purchase of fish skins, an article of which the supply was limited and from which the fish glue is manufactured, so that there should be no competition between them. The plaintiff was to fix the price of all skins purchased, and the parties were to have certain places assigned to them by two persons named, of which they were respectively to have the product. From the proprietors of certain other places mentioned the defendant was to have the entire product, and to allow the plaintiff to receive from it one third thereof, and the two parties were to divide equally between them the skins which might be obtained from new producers. They were both to sell the glue at the same price, to be agreed upon from time to time, and the contract contained other stipulations the effect of which was to prevent competition between them. The contract was made in February, 1884. After they had conducted the business in this manner until early in 1887, it became evident to both that the patent was invalid, although no formal judgment was rendered declaring it so. Thereupon, Brooks, the manager of the defendant company, made a large number of what are known as the long term contracts, for the purchase of all skins to be produced until the year 1900, with nearly all the producers of fish skins known to the parties. The plaintiff received its share of these skins, and no difficulty arose between the two companies until early in July, 1890, when the defendant notified the producers of skins by whom the plaintiff had been supplied up to that time not to deliver it any more skins, and also notified the plaintiff of its abandonment of the contract. Until then the parties had gone along under the contract as modified by mutual

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consent, and no intimation had been given the plaintiff of any intention to abandon it. The object of the bill is to compel the defendant to permit the plaintiff to obtain directly from the producers, or through the defendant, what it deems its share of the fish skins. The defendant rests its defence on several grounds. It contends that the contract as originally made was void as contrary to public policy; that it cannot be enforced, because, the patent being invalid, there was no sufficient consideration for it; that, if it is binding, the plaintiff has a complete and adequate remedy at law; that, if the plaintiff is entitled to any relief at all, it should be compelled to take its proportion of the waste received by the defendant under the long term contracts with third parties; and finally, that, if the plaintiff had a right to specific performance of the contract, it has lost it, by reason of its own conduct, and the conduct of the defendant to which it has assented since the original contract was made.

The original purpose of the contract was to regulate the business of manufacturing a product under what was supposed to be a new invention, on which letters patent of the United States had been issued, whereby an article then nearly worthless might be converted into an article of large value. The use to which the fish skins were put under this invention gave them their market value. The plaintiff and the defendant sought to unite with each other in the purchase of the raw material, so that they might not be tempted to overbid each other and thus to raise it to an unreasonable price, and also to agree on the price at which the manufactured article should be sold, so that they might be secure in a reasonable profit. Even if they hoped for gain by their joint exertions, or by the possession of a patent as to the value of which they were subsequently disappointed, their contract had no relation to an article of prime necessity, or to staple commodities ordinarily bought and sold in the market, but to a particular article, of which both were manufacturers under the same process, and to an article used in the manufacture which was of little value for any other use. That the agreement was not obnoxious to the objection made by the defendant is shown by the case of *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353.

The next inquiry is whether the contract is incapable of en-

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forcement for want of consideration. If there were no consideration for it but a transfer of an interest in a void patent, it would be invalid. *Nash* v. *Lull*, 102 Mass. 60. *Harlow* v. *Putnam*, 124 Mass. 553. The parties had been engaged in extended litigation involving several suits. As between them and for that litigation the validity of the patent had been established by a decision of the Circuit Court of the United States; and a judgment for damages in favor of the plaintiff against the defendant was about to be rendered. An important part of the consideration of the contract was a compromise and adjustment of the controversy which had taken form in the suits then pending, and a liquidation of the damages which the plaintiff was about to recover under the decision of the court. Moreover, the parties were competitors in business, and for mutual advantage they entered into mutual covenants as to the mode of conducting their business, and the covenants of each in that particular were a consideration for the covenants of the other. Before the invalidity of the patent was discovered, they had performed the contract in part, and what each had done in the management of its business was a part of the consideration for what remained to be done by the other. The belief that the patent was valid was one of the causes of making their agreement, but it was not the consideration of it in any sense in which it can be separated from the other objects and promises which formed a part of the consideration. Both parties are disappointed in regard to a fact upon which they supposed they could rely, but the contract cannot therefore be avoided, so far as it is executory, when so many other elements entered into it, and when the parties have for a long time been deriving advantage from it, not only in their dealings with each other, but with the public.

If it should be held that the right to use the patent formed so large a part of the consideration for the defendant's undertaking that, after the discovery of the mistake of the parties in this particular, a court of equity would decline to decree specific performance against the defendant if it had seasonably sought to avoid the contract on the ground of mistake, there are reasons why such a defence should not avail the defendant in this case. After both parties knew that the patent was void, the defendant still chose to avail itself of the benefits of the contract,

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and to go on under it. There had been no adjudication that the patent was invalid, and the existence of the patent and of the arrangement under which the plaintiff and the defendant were acting was probably somewhat advantageous to the parties long after they discovered that the patent would not protect them if put to the test of litigation. The report finds that "both parties attempted in good faith to do what the contract called for, and no complaint has ever been made of a breach of any of its provisions by either of them until July, 1890, a few days before the commencement of this suit." In making the long term contracts, Brooks, the defendant's treasurer and manager, acted without the knowledge of the other officers of either of the corporations, in order that he might make the contracts quickly; but it must be inferred that he intended that the plaintiff should have the benefit of them as well as the defendant, so far as might be necessary to carry out in substance the provisions of the contract existing between them. This is apparent from the fact that before buying the skins of the firms of Shute and Merchant, John Pew and Son, and Cunningham and Thompson, he executed another agreement in the name of the defendant corporation, which was professedly a contract for the protection of the plaintiff in regard to the right to purchase skins after the expiration of the agreement between the plaintiff and the defendant, and until the year 1900. Perkins, who was president of the plaintiff corporation, and who controlled the sale of the skins and waste of the above mentioned firms, would not consent to a sale of the skins unless the defendant would sign a contract for the protection of the plaintiff after the expiration of the agreement, and it was assumed by both parties that the plaintiff would have the benefit of these purchases, and would need no protection during the continuance of the original agreement. The report recites: "The action of Brooks in buying the skins was afterwards approved and ratified by the officers of both corporations, and the plaintiff has received skins purchased under some of these contracts, and paid for them at the rate of twenty dollars per ton until July, 1890." The action so ratified and approved must be deemed to have been for the benefit of both corporations, at least until the expiration of their original contract. The conduct of the parties was, in effect, an affirmance and renewal of

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the contract after the invalidity of the patent was well known. It would be most inequitable to permit the defendant — after having induced the officers of the plaintiff to consent to its purchase of nearly all the skins which would be likely to come into the market for a long term of years, on the faith of an understanding that the plaintiff was to share in the benefits of the purchase — to repudiate the contract, and leave the plaintiff without the means of procuring skins to carry on its business. We are of opinion that, if the defendant might successfully have defended against a suit for specific performance on the ground of the invalidity of the patent if it had sought to repudiate the contract on the discovery of the mistake, it has so far affirmed the contract since that it cannot do so now.

The next objection of the defendant is, that, even if it violates its contract, it is not shown that the plaintiff has not an adequate remedy at law. The only remedy which the plaintiff could have at law would be by a recovery of damages for the failure of the defendant to deliver, or to allow those to deliver with whom it had made contracts in its own name but for the benefit of both, the due proportion of fish skins to the plaintiff. It sufficiently appears that the principal market for them is in Gloucester, that most of the skin producers there are under contract with the defendant, and that fish skins are of very limited production. "If the plaintiff is unable to obtain skins produced by firms which have contracted with the defendant," it is found that "it will be very difficult, if not impossible, for it to carry on its business." This continuing injury, leading to difficulties in the management of the plaintiff's business, and possibly to its utter destruction, is one that could not be measured in damages. It would be practically impossible to estimate the amount of the injury, or to repair it. The plaintiff's property invested in the manufacture must lose a considerable, but uncertain, amount of its value. The injury thus threatened would be practically irreparable. *Florence Sewing Machine Co.* v. *Grover & Baker Sewing Machine Co.* 110 Mass. 1, 11.

It is urged that, if the plaintiff is entitled to any relief at all, it should be compelled to take its proportion of the waste as well as of the skins, including in the computation the waste and skins of George Perkins and Son. In addition to the fish skins,

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which were the most valuable product for the manufacture of glue which is left in the business of cutting and packing salt fish, there remain fins, bones, tails, etc., which go by the technical name of waste. A fish glue of an inferior character is made therefrom. As to certain firms, including George Perkins and Son, with whom the long term contracts for fish skins were made by Brooks, it appears that they would not sell the skins unless the defendant would agree to buy the waste also, and pay a fixed price therefor. While the contracts made by Brooks were ratified so far as the purchase of skins was concerned, the plaintiff has neither recognized nor been required to recognize them so far as waste is concerned. The plaintiff does not use waste, nor has it been requested by the defendant to take it. The defendant has manufactured this itself, and it does not appear that such manufacture is unprofitable. The business was thus conducted, and the plaintiff received its allotted portion of skins, from 1887 until July, 1890, when the defendant announced that it should retain all the skins for which it had made contracts. While there had been no formal fixing of prices at which the skins should be bought, this had been substantially arranged between the parties without disagreement, but it nowhere appears that the waste was at any time made the subject of negotiations. In regard to the mode of delivery of the skins, it had been arranged that the plaintiff should receive, as its fair proportion, those contracted for with Tarr and Brother and with Wanson and Company, paying the producers therefor, the charge being made directly to the plaintiff. It was also arranged that the establishment of Shute and Merchant should be allotted to the plaintiff, the charge for the skins produced there being made to the defendant, and the payment being made by the plaintiff to the defendant, and by it to Shute and Merchant. Nowhere was there a suggestion that the plaintiff should pay for waste, although there was a provision for the sale of it in the contract with Shute and Merchant. We are of opinion that the defendant cannot compel the plaintiff to take any portion of the waste. The conduct of the parties is quite conclusive that there was no bargain between them as to this.

The defendant further contends, that, if the plaintiff had a right to have the contract specifically enforced, it has lost it by

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its own conduct since the contract was made. It is found that both parties have attempted in good faith to do what the contract called for. The licenses granted by the plaintiff to other parties to manufacture under the patent were assented to by the defendant, two of them by giving certificates under seal, and one orally, by its president and general manager, acting in its behalf. The purchase by the plaintiff at one time of four or five tons of extra fish skins in a neighboring State, at a price a little higher than they were paying at home, did not injure the defendant, and it is not contended in argument that the contract can be avoided for that reason. But in some other particulars the parties have not literally followed the terms of the contract, but by a common understanding and mutual consent have modified the execution of it in details. It sometimes happens that, by such variations from an agreement, the parties leave their rights so uncertain that specific performance of the contract cannot be decreed. But if, after changes are assented to, it is still clear what the rights of the parties are under the contract as modified, there is nothing to prevent the enforcement of those rights by a decree for specific performance. Even if the agreement were wholly oral, it might be specifically enforced. *Somerby* v. *Buntin*, 118 Mass. 279, 287. Whatever uncertainties and difficulties might arise if the plaintiff sought literally to enforce the original provisions of the contract, the parties have by their acts so applied the contract to the new conditions which they have created, as to make it clear that the plaintiff is entitled to have the skins purchased of Tarr and Brother, Wanson and Company, and Shute and Merchant, under the contract as interpreted, modified, and applied by the parties by mutual consent and for their common benefit. Of course third parties who have made contracts with the defendant cannot be compelled to act otherwise than in conformity with their agreements. But the relief to which the plaintiff is entitled, and all that it asks for, will be obtained by an order that the defendant deliver to the plaintiff on demand the fish skins received from the three firms named, on payment to it of what the skins cost the defendant, so long as these shall not exceed the proportion which the plaintiff is entitled to receive.

Decree accordingly.

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CHARLES N. BACON *vs.* CITY OF BOSTON.

Middlesex. January 15, 1891. — June 25, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, & MORTON, JJ.

Eminent Domain — Nuisance — Remedy.

The St. of 1881, c. 303, § 8, empowering the city of Boston, for the protection of its water supply and the abatement of a nuisance, to take land at or near the line of a certain sewer and to construct works for treating the sewage and freeing it from noxious and offensive matters, and providing for compensation for the land so taken, did not authorize the city to create a serious nuisance to the neighboring estate of a private owner by offensive odors and filthy percolations into and through the soil; and such a nuisance, if created, does not constitute a substantial taking of such neighboring estate, compensation for which must be sought under the statute, but recovery therefor may be had in an action of tort for damages.

TWO ACTIONS OF TORT, to recover damages alleged to have been caused to the plaintiff's estate for two successive periods of time between December, 1881, and September, 1884, by offensive odors and filthy percolations through the soil. The cases were tried together in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows.

It appeared from the plaintiff's evidence that he was the owner of an estate in Winchester, worth from $25,000 to $40,000, upon which were a dwelling-house and factory for the manufacture of woollen goods; that the city of Boston, claiming to act under the St. of 1881, c. 303,* had taken lands in Winchester

* Section 1 of this act directed the city of Boston to cease emptying sewage into the Mystic Lower Pond, unless purified by the city from all offensive and noxious properties and substances, and section 2 directed the city to cause this pond to be cleansed of such impurities as had accumulated therein.

Section 3 is as follows: "The city of Boston is hereby authorized to take and hold, for the time necessary to carry out the provisions of this act, such lands in the towns of Woburn or Winchester, on or near the line of said sewer, as it shall deem necessary, and may construct such canals, basins, tanks, passageways and works as may be necessary to enable said city to treat said sewage and waters, in order to free the said waters of all noxious, dangerous and offensive matter and properties. Said city shall make compensation to the owners for such lands as it shall take under this act, and if

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adjoining the plaintiff's estate, and on the line of a sewer which was built by it through Winchester, under the St. of 1875, c. 202, and emptied into the Mystic Lower Pond to the extent of 300,000 or 400,000 gallons of sewage a day; that this sewage had been taken by the city, against the plaintiff's objection, from the sewer into canals, basins, and tanks built by it on the land so taken, in order to treat such sewage so as to free it from noxious and offensive matter; that the sewage thus treated gave forth noxious and offensive odors, which penetrated to the adjoining estate of the plaintiff, and rendered him and many of his workmen ill, and caused them great discomfort; that for about one month, in August, 1883, the plaintiff was obliged to close his factory on account of such odors; that the sewage also percolated through the soil and into the plaintiff's estate, and rendered the water in the wells on the estate unfit for drinking or for manufacturing purposes; and that the plaintiff's estate and the plaintiff's goods were greatly injured both in market value and in prestige.

At the close of the plaintiff's evidence, the defendant, who offered no evidence, requested the judge to rule that the plaintiff could not maintain his action; but the judge refused so to rule, and submitted the case to the jury.

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

A. J. Bailey, for the defendant.

B. F. Butler & F. L. Washburn, for the plaintiff.

ALLEN, J. The St. of 1881, c. 303, § 3, by its true construction, does not authorize the city of Boston to create the nuisance to the plaintiff's land for which he seeks to recover damages. For purposes beneficial to the water supply of Boston, the city was authorized to take such lands in Woburn or Winchester, on or near the line of a sewer, as it should deem necessary, and construct works in order to treat sewage, and free it from noxious and offensive matter and properties. The selection

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said city and said owners do not agree any person aggrieved shall be entitled to have his damages ascertained by a jury upon petition to the county commissioners of Middlesex County, the proceedings upon which shall be like those provided for the recovery of damages in the taking of lands for highways."

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of the lands to be taken, within the prescribed limits, was left to the city. It does not appear that it was necessary to create such a nuisance as the plaintiff has suffered from. We need not consider whether the Legislature had power to authorize such an injury without payment of compensation. The general rule is, that the Legislature may authorize small nuisances without compensation, but not great ones. *Sawyer* v. *Davis*, 136 Mass. 239, 243. But it will not be assumed that the Legislature intended to authorize a nuisance, unless this is the necessary result of the powers granted. *Morse* v. *Worcester*, 139 Mass. 389, 391. *Boston Belting Co.* v. *Boston*, 149 Mass. 44. *Baltimore & Potomac Railroad* v. *Fifth Baptist Church*, 108 U. S. 317. See also *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193; *London, Brighton, & South Coast Railway* v. *Truman*, 11 App. Cas. 45; *Cogswell* v. *New York, New Haven, & Hartford Railroad*, 103 N. Y. 10, 21; *Edmondson* v. *Moberly*, 98 Misso. 523. In the statute of 1881, the Legislature enacted that one nuisance should cease, and authorized the taking of lands and construction of works for the purpose of treating sewage, giving a wide discretion as to the selection of the place, it provided for compensation for the taking of the lands, but none for other injury to owners of lands, and upon well established rules it must be deemed that the Legislature did not intend to sanction a serious nuisance to lands not taken.

It is contended by the plaintiff, that the nuisance to his land is such as to amount to a substantial taking of it; to which the defendant replies, that, if so, the plaintiff's sole remedy is under the proceedings provided for in the statute, and not by an action at law. Without going into the vexed question of what sort of a nuisance may amount to a taking of property, it is enough for present purposes to say that here was no taking of the plaintiff's land within the meaning of the St. of 1881, c. 303, § 3. That section only provides compensation for lands actually taken by the city, and does not include compensation for such an injury as was shown in this case. The statutory remedy, therefore, was not open to the plaintiff, and he was left to his action at law.

Exceptions overruled.

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THEODORE H. TYNDALE *vs.* BENJAMIN RANDALL.

Suffolk. January 15, 1891. — June 25, 1891.

Present: C. ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Present Gift — Condition.

In an action by an administrator to recover the value of certain coupons delivered by the intestate to the defendant for collection, the evidence was that the intestate told the defendant, after the delivery and on the eve of his departure for a distant city, to take the coupons and remit the proceeds to the intestate as they became due if the intestate lived, but if he never came back, to keep them in part payment for services already rendered by the defendant to him. *Held*, that the jury were warranted in finding a present conditional gift to the defendant, which would confer upon him a good title to such coupons as were not due at the intestate's death.

CONTRACT, with a count in tort, by the administrator of Luigi Dama, to recover the proceeds of certain coupons collected by the defendant. At the trial in the Superior Court, before *Lathrop*, J., the defendant testified, in substance, that before June 10, 1887, he had rendered certain services for the intestate, who was his brother in law, for which he had not been paid, and that on that date the intestate, being on the eve of departing for San Francisco, delivered the coupons in question to him, and told him to remit the proceeds thereof to the intestate, but if the intestate never came back, to keep the coupons the proceeds of which had not been remitted, as partial compensation for his services. The defendant in one portion of his testimony stated that the intestate said, "Keep them in part pay for services," and in another, that he said, "You keep these, and if the worst should happen that I fear, you will have these to partly pay you."

The plaintiff requested the judge to instruct the jury, that, if Dama had a right to the proceeds of the coupons if he had lived, there was no valid gift or pledge of the coupons to the defendant in case of his death. The judge declined so to instruct the jury, and instructed them, in substance, that, if they believed the testimony of the defendant, — to wit, "that, inasmuch as he had rendered certain services to Mr. Dama prior to that time, and

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made certain advances, he was to take those coupons, and although he was to remit them as they became due, if Mr. Dama lived, still, if the worst happened and he did not come back, he was to keep these to pay himself for, or in part compensation for, what was due," — the arrangement to which he testified gave him a valid title to the coupons, and their proceeds so far as not remitted to Dama at the time of his death.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in January, 1891, and afterwards, in June following, was submitted on the briefs to *Allen*, *Holmes*, *Morton*, and *Lathrop*, JJ.

J. R. Smith, for the plaintiff.

A. Russ, for the defendant.

HOLMES, J. This is an action to recover the proceeds or value of certain coupons received by the defendant from Dama, the plaintiff's intestate, to collect. The real difference between the plaintiff and the defendant, in their argument before us, is in their interpretation of the defendant's evidence. The defendant testified, in different forms, that Dama, after delivering the coupons to him, told him to remit the proceeds to Dama, who was just returning to San Francisco, but if Dama never came back, to keep them in part pay for services. The plaintiff treats this as language looking only to the future, as in *Fearing* v. *Jones*, 149 Mass. 12. But it was at least possible for the jury to find that Dama purported to transfer a present right to the defendant, and that the case stood as if Dama had delivered the coupons to the defendant at the moment of the conversation as his property, whether by way of gift or payment is not material, on the condition, however, that, if Dama was alive when the coupons fell due, then the proceeds should be remitted to him. If the jury found that to be what happened, the defendant got a good title to the coupons not due at Dama's death. This is what we understand the instructions to the jury to mean. See *Davis* v. *Ney*, 125 Mass. 590; *Stone* v. *Hackett*, 12 Gray, 227.

Exceptions overruled.

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WILLIAM H. JOHNSON *vs.* BENJAMIN F. BROWN.

Middlesex. January 15, 16, 1891. — June 25, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, & MORTON, JJ.

Promissory Note — Notarial Certificate — Notice to Indorser — Mailing.

Any instrument, purporting to be a protest of a bill or note duly certified by a notary public under his hand and official seal, is competent evidence thereof, without proof that the signature is his, or that he is a notary at the date of the protest.

A notice of the non-payment of a promissory note, addressed to the indorser and deposited in a post-office box in a public street, is duly mailed to him.

CONTRACT on a promissory note, dated June 6, 1889, and payable three months after date at any bank in Boston, and indorsed by the defendant.

At the trial in the Superior Court, before *Hammond*, J., the plaintiff, for the purpose of showing that the note was duly protested for non-payment, offered in evidence a paper, purporting upon its face to be a notarial certificate of one Briggs, with a seal thereon, setting forth that on September 9 he made demand for payment of the note at a certain bank in Boston, and protested the note for non-payment. The defendant contended that there must be some evidence of the signature of the notary, and also some evidence that Briggs was a notary at the time the note was protested. The judge ruled that the certificate was admissible without such evidence, and admitted the certificate, against the defendant's objection; and the defendant excepted.

The plaintiff further testified, that he received two notices on September 10, about nine A. M., from the cashier of the bank, of the dishonor of the note, and that on the same day, and about ten A. M., he mailed one of these notices to the defendant, postage prepaid, and addressed to him at Waltham, by depositing the notice in a post-office box in a public street, and about five minutes' walk from the post-office building in Waltham. There was no evidence introduced as to the time or manner of collecting letters deposited in this post-office box, or what length of

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time would elapse after a notice so deposited would reach the post office itself.

The defendant asked the judge to rule that the deposit of the notice in a post-office box on the street was not sufficient, and that it should have been deposited in the post office itself; but the judge refused so to rule, and the defendant alleged exceptions.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. M. Browne, for the defendant.

R. M. Stark, for the plaintiff.

ALLEN, J. 1. The notarial certificate of protest was competent, without further proof. This has often been so held, in respect to foreign bills. *Porter* v. *Judson*, 1 Gray, 175. *Pierce* v. *Indseth*, 106 U. S. 546. *Browne* v. *Philadelphia Bank*, 6 S. & R. 484. For this purpose, the different States of the Union are deemed foreign to each other, so that a notarial certificate of protest under seal is good on mere production. *Townsley* v. *Sumrall*, 2 Pet. 170. *Halliday* v. *McDougall*, 20 Wend. 81. *Carter* v. *Burley*, 9 N. H. 558, 566. See also *Phœnix Bank* v. *Hussey*, 12 Pick. 483. By St. 1880, c. 4, re-enacted in Pub. Sts. c. 77, § 22, protests of domestic bills of exchange and notes are put upon the same basis. The meaning is the same as if the language had been, that any instrument purporting to be a protest of a bill or note, duly certified by a notary public under his hand and official seal, shall be *prima facie* evidence. Notaries public hold office under the Constitution. With the aid of the statute, if not without, courts may take judicial notice of the seal of the notary public, and as a next step, may take notice of his signature also. 1 Greenl. Ev. §§ 5, 6. *In re Phillips*, 14 Nat. Bank. Reg. 219. *Denmead* v. *Maack*, 2 MacArthur, 475. *Tunstall* v. *Parish of Madison*, 30 La. An., pt. 1, 471, 477. *Wetherbee* v. *Dunn*, 32 Cal. 106. *Graham* v. *Anderson*, 42 Ill. 514. *State* v. *Williams*, 5 Wis. 308.

2. The deposit of the notice in a post-office box on the street was just the same, in legal effect, as if it had been deposited in a box at the post office. *Skilbeck* v. *Garbett*, 7 Q. B. 846. *Pearce* v. *Langfit*, 101 Penn. St. 507.

Exceptions overruled.

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ANNJANETTE LOWD *vs.* GEORGE W. BRIGHAM.

Middlesex. January 23, 1891. — February 27, 1891.

Present: FIELD, C. J., W. ALLEN, C. ALLEN, HOLMES, & MORTON, JJ.

Middlesex. March 9, 1891. — June 25, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Partition — Interlocutory Finding — Practice — Exception — Delivery of Deed — Adverse Possession.

Exceptions taken and allowed in the Superior Court in partition proceedings which result in an interlocutory finding for the petitioner, may thereupon, before further proceedings are had in that court, be entered and heard in this court, if justice requires that it should be done.

At the trial of a petition for partition, on the issue of the delivery of a deed relied on by the petitioner and executed apparently in due form, there was evidence that the grantee had a bond for a deed from the grantor; that an attesting witness thereto, who certified that it was signed, sealed, and delivered in his presence, prepared the deed and saw it signed, and had no further recollection of the matter; that soon after the grantee's death the deed was seen in the possession of his widow, who lived in the house with him; and that a paper signed by the respondent, dated ten days after the grantee's death, referred to the deed as then existing. The respondent, though a witness, gave no explanation of this paper. *Held*, that it could not be said, as matter of law, that there was not sufficient evidence of the delivery of the deed.

The respondent, who relied on a title by adverse possession, testified that his father, the grantee in the deed, gave him the land; that he erected a building thereon, received the rent, and occupied the same adversely; and that a bill of sale of the building, signed by him and found with the deed after the grantee's death, never took effect. There was also evidence that the respondent had recently said that he did not own the land in dispute, but only the building. *Held*, that the evidence did not show, as matter of law, that a title had been gained by adverse possession.

PETITION for partition of a parcel of land in Marlborough, originally filed and amended in the Probate Court, and thence removed to the Superior Court under the Pub. Sts. c. 178, § 46, alleging that the estate could not be advantageously divided, and praying that commissioners be appointed to make partition thereof by a sale and conveyance, and to pay over the proceeds of the sale in such manner as to make the partition just and equal. At the trial in the Superior Court, without a jury, *Hammond*, J. found that "the petitioner is entitled to have

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partition as prayed for in her amended petition as to all the land described in said amended petition"; and the respondent alleged exceptions to certain rulings and refusals to rule by the judge. These exceptions were examined and allowed by the presiding judge, and were duly entered upon the docket of the full court for argument.

The case was submitted on briefs, in January, 1891, upon the question whether the exceptions had not been entered prematurely.

E. F. Johnson, for the petitioner.

T. G. Kent & G. T. Dewey, for the respondent.

FIELD, C. J. This is a petition for partition, originally brought in the Probate Court, from which it was removed to the Superior Court, pursuant to the Pub. Sts. c. 178, § 46. The petition was tried in the Superior Court before a judge, without a jury, and the court found that "the petitioner is entitled to have partition as prayed for in her amended petition as to all the land described in said amended petition." Exceptions were taken to the rulings of the court at the trial, which have been allowed. These exceptions were entered upon the docket of the full court, and the question arose whether they had not been prematurely entered, and, at the suggestion of the court, this question has been argued by counsel. The finding in this case is interlocutory, and it does not appear that the interlocutory judgment has been entered; Pub. Sts. c. 178, § 19; but there seems to be no reason why this should not be done, unless the pendency of these exceptions is a reason. It is alleged in the petition that the real estate cannot be advantageously divided, and the prayer is that the commissioners to be appointed may make sale and conveyance of it, and may distribute and pay over the proceeds in such manner as to make the partition just and equal. Pub. Sts. c. 178, § 65. The petitioner contends that, if these exceptions cannot be entered and heard until after commissioners have been appointed, and they have made partition by sale and have made their report, and this report has been confirmed by the court, injustice will be done; not only because, if the exceptions are sustained, all the proceedings of the commissioners will be void, but because the commissioners cannot properly make sale of the real estate, if it is found that it cannot be

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advantageously divided, unless they can make a good title, and it cannot be known whether they can make a good title until after these exceptions have been heard and determined.

The statutory provisions relating to exceptions are the Pub. Sts. c. 153, §§ 8–15. Section 15 provides that the papers relating to a question of law arising upon appeal, by bill of exceptions, reserved case, or otherwise, shall be prepared by the clerk of the court, and shall thereupon "be transmitted to and entered in the law docket of the Supreme Judicial Court for the proper county as soon as may be after such question of law is reserved and duly made a matter of record in the court where the action is pending; but the entry thereof shall not transfer the case, but only the question to be determined."

In *Boyce* v. *Wheeler*, 133 Mass. 554, it is said in the opinion: "The rule of law is well settled that, in cases pending in the Superior Court, questions of law arising therein cannot be entered and heard in this court, upon appeal or exceptions, until after final judgment in the Superior Court. Until such final judgment, this court has no jurisdiction to hear and determine the questions of law." It is plain, however, that this statement is not literally true. In the great majority of cases in which exceptions are taken in the Superior Court, they are heard by this court before final judgment has been entered in the Superior Court. Where exceptions are taken at the trial of questions of fact, the statutes provide that no judgment shall be entered, "unless the exceptions are adjudged immaterial, frivolous, or intended for delay." Pub. Sts. c. 153, § 11. See Pub. Sts. c. 150, § 15. The meaning of the clause cited from the opinion in *Boyce* v. *Wheeler* is shown by subsequent clauses in the same opinion. It is there said: "There has been no final judgment in the case, and it is not ripe for a final judgment. . . . The decision of the court to which exception was taken was an interlocutory decision, and therefore the exceptions in this case have been prematurely entered in this court." This court has uniformly held that exceptions to interlocutory rulings or orders cannot be entered and heard in this court, when, by subsequent proceedings in the case in the court where it is pending according to the regular course of proceedings, the exceptions may become immaterial. A party may seem to be aggrieved by an

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interlocutory ruling, and yet, as the cause proceeds to a conclusion, he may in the court where it is pending prevail to the full extent of his claim, and it would be useless for this court to hear and decide exceptions before it appeared that the excepting party had been injured by the rulings excepted to, if they were erroneous. This, we think, is the foundation of the rule, that exceptions taken in interlocutory proceedings cannot be entered in this court until the case is either finally disposed of in the court in which it is pending, or is in a condition to be finally disposed of there, if the exceptions are overruled. *Safford* v. *Knight*, 117 Mass. 281, and cases cited. *Boyce* v. *Wheeler*, 133 Mass. 554, and cases there cited. *Elliot* v. *Elliot*, 133 Mass. 555. *Comins* v. *Turner's Falls Co.* 140 Mass. 146.

In *Bennett* v. *Clemence*, 3 Allen, 431, the plaintiff demurred to the defendant's answer, and the court sustained the demurrer as to a part of the answer, and overruled it as to the residue; the plaintiff appealed from this decision, and, no further proceedings having been had, he entered his appeal in the full court, and contended that he had a right to have it heard and decided. The appeal was dismissed. It is said in the opinion, that "the provisions of the General Statutes are not very explicit on this subject," but that § 12 of the Gen. Sts. c. 115, "implies that the case is to be finished in the Superior Court before the questions are transferred to this court; for no provision is made that the trial shall be suspended and the case continued there, until the interlocutory question can be argued and determined here." The case arose under the General Statutes, and before the St. of 1864, c. 111. Under the General Statutes, as now under the Public Statutes, the case was not transferred, but only the question of law to be determined; Gen. Sts. c. 115, § 12; and when exceptions were taken and entered after verdict in the Superior Court, it was within the power of that court to set aside the verdict and proceed with the trial *de novo*, although the exceptions were pending before the full court. Whatever distinction there may be between the statutes relating to appeals and those relating to exceptions, the real ground of the decision in *Bennett* v. *Clemence*, we think, is expressed in the last paragraph of the opinion. See *Piper* v. *Willard*, 6 Pick. 461; *Commonwealth* v. *Sallen*, 11 Gray, 52; *Bursley* v. *Barnstable*, 14 Gray, 106; *Commonwealth* v. *McCormack*, 126 Mass. 258.

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There is certainly nothing in the existing statutes indicating that exceptions may not always be entered in the full court as soon as may be after they are allowed, but the general practice has become settled not to allow exceptions to be entered and heard until the case is, according to the regular course of procedure, ripe for final judgment in the court where it is pending. This does not, however, prevent the court in which the case is pending, after exceptions have been taken and entered, or even after a rescript has been sent down overruling the exceptions, from setting aside the verdict, discharging agreed facts, or allowing an amendment changing the case from an action at law to a suit in equity. *Terry* v. *Brightman*, 133 Mass. 536. This rule of practice certainly has been carried very far. The decisions which most nearly resemble the case at bar are *Elliot* v. *Elliot*, 133 Mass. 555, where an appeal was taken; and *Marshall* v. *Merritt*, 13 Allen, 274, *Crompton Carpet Co.* v. *Worcester*, 119 Mass. 375, and *Comins* v. *Turner's Falls Co.* 140 Mass. 146, where exceptions were taken. Still there is no decided case exactly like the present.

The judgment that partition be made is a separate judgment from that rendered on the report of the commissioners, and there is a provision in the statutes for separate appeals from these judgments, and that in an appeal from the judgment on the report the judgment awarding partition shall not be drawn in question. Pub. Sts. c. 178, § 33. It is hardly conceivable that any proceedings that may be taken in regular course in the present case will render these exceptions immaterial, and a sale of the real estate would be impracticable before it was finally established that partition be made. On the alleged facts of this case we think that the reason of the rule of practice which has been adopted in great part fails, and that it is within the discretion of this court to permit these exceptions to be entered and heard, and that justice requires that this should be done. In *Aldrich* v. *Husband*, 131 Mass. 480, questions of law arising at the trial of a petition for partition were reported and heard, without waiting for the report of commissioners, but the question considered in the present case was not raised.

The order is, that the

Exceptions stand for hearing.

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The bill of exceptions was, in substance, as follows. The petitioner and the respondent, who were brother and sister, were two of the heirs at law of Ashbel Brigham. The respondent claimed to be the sole owner of a portion of the premises in question, with certain buildings standing thereon. The petitioner relied on an alleged deed of the premises, purporting to be executed by one Phelps to Ashbel, three days before the latter's death.

The deed purported to be witnessed by one Dockray, a lawyer, above whose name were the words, "Signed, sealed, and delivered in presence of." Dockray was not present at the trial, but it was admitted that, if present, he would testify that the deed was in his handwriting, but that he had no other or further recollection of the matter, and that he saw Phelps sign the deed.

There was evidence that, prior to his death, Ashbel had a bond for a deed of the property from Phelps, and that within two months of the death of Ashbel the deed was seen in the possession of his widow, who lived in the dwelling-house on the premises occupied by Ashbel at the time of his decease. The petitioner introduced in evidence an instrument in writing, signed by the respondent, and dated October 21, 1861, which referred to said Phelps deed as existing at that time. Charles Brigham, another son of Ashbel, testified that, during the week before his father died, he had the entire care of him and was constantly with him; that during that time he did not see either Phelps or Dockray with his father or about the premises; and that he heard nothing about the making or delivery of the Phelps deed.

The respondent asked the judge to rule that there was not in law sufficient evidence of a delivery of the Phelps deed to warrant a finding for the petitioner in this petition. The judge refused so to rule, and the respondent excepted.

The respondent testified that in 1854 or 1855, when he was twenty-one years old, his father, to induce him to remain at home, offered to give him the land in question, on which he might erect a shop and go into the shoe business; that he accepted the offer, built a shop on the land, and occupied it for two or three years; that he then changed the building into a

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dwelling-house, and let the property up to the time of his father's death, and received all the rent; and that after the decease of his father he continued to occupy the dwelling-house erected by him, and the land under the same, taking all the rent up to 1887, under the same claim of right as before his father's death, and that he occupied said premises adversely and under a claim of right. It was in evidence that an instrument, of which the following is a copy, signed by the respondent, was found with the Phelps deed: "Marlborough, June 12, 1856. Ashbel Brigham bought of G. W. Brigham one house situated on his land subject to a mortgage of $200 running to Geo. Brigham 2d, price $400. Geo. W. Brigham."

The respondent further testified, that this writing was never delivered by him to his father, and his father never paid him the $400, or any part thereof; that he made the writing at a time when he was connected in business with his uncle, and there was some danger of a failure; and that he left it in his desk, where both he and his father kept papers.

The petitioner offered in evidence the testimony of Charles Brigham and two sisters, all heirs at law of Ashbel, that within two or three years, and after the death of the widow, in a conversation with the respondent, he stated that he did not own the land in dispute, but only the building, and that he would pay the heirs a certain rent for the land.

After the evidence was closed, the respondent insisted, and asked the judge to rule as matter of law, that there was not evidence in the case sufficient to warrant the court in finding that the petitioner had made out her case for partition, and that as to the premises in dispute there should be judgment for him. The judge refused so to rule, and found for the petitioner as to all the land; and the respondent alleged exceptions.

The case was submitted on briefs, on the questions of law arising upon the exceptions, in March, 1891, by the same counsel.

ALLEN, J. The evidence of the delivery of the deed to Ashbel Brigham was sufficient to warrant a finding that it was delivered. The grantee had a bond for a deed from the grantor. The execution of the deed was apparently in due form, an attesting witness certifying that it was signed, sealed, and delivered

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in his presence. It was admitted that this witness, who was a lawyer, would testify, if present at the time, that he prepared the deed, and saw it signed, and had no further recollection in the matter. This was some evidence of delivery. *Brabrook* v. *Boston Five Cents Savings Bank*, 104 Mass. 228, 232. *Howe* v. *Howe*, 99 Mass. 88. *Moore* v. *Hazelton*, 9 Allen, 102. In addition to the above, there was evidence that soon after the grantee's death the deed was seen in the possession of his widow, who lived in the house with him. Moreover, a paper signed by the respondent, dated ten days after the grantee's death, referred to the deed as then existing. The respondent, though a witness, gave no explanation of this paper. Under these circumstances, it could not be ruled in favor of the respondent that there was not in law sufficient evidence of a delivery of the deed.

The testimony of Charles Brigham, tending to show that there could not have been an actual personal delivery of the deed to the grantee by the grantor or his lawyer at or after its date, might not be accepted as literally accurate, but even if so accepted, it did not show that there could not have been a valid delivery to the grantee, either directly by the grantor, or through some one else, or a delivery to some one authorized to receive it for the grantee.

The evidence of adverse possession did not necessarily require the court to find that a title was thereby established in the respondent. He testified virtually that his father, who was the grantee in the deed above referred to, gave the land to him, and that he built a shop thereon, which he changed into a dwelling-house, and received the rent thereof, and that he occupied the same adversely. On the other hand, a paper in the form of a bill of sale of the house to his father, signed by the respondent, was found, and three witnesses testified that the respondent had recently said that he did not own the land in dispute, but only the building. In view of this evidence, the court might well find his claim of title to the land by adverse possession not established, notwithstanding his explanations. Certainly it was not necessary to find in favor of such title.

Exceptions overruled.

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COMMONWEALTH *vs.* DANIEL CALHANE.

Middlesex. February 2, 1891. — June 25, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Intoxicating Liquors — Common Nuisance — Original Package — Constitutional Law.

Since the U. S. St. of August 8, 1890, the agent in this Commonwealth of a wholesale dealer in intoxicating liquors in another State, who sells or offers for sale such liquors, whether in the original packages or otherwise, shipped to him by such dealer, although he sells no other liquors, may be convicted of keeping a common nuisance under the Pub. Sts. c. 101, §§ 6, 7.

COMPLAINT on the Pub. Sts. c. 101, §§ 6, 7, to the Police Court of Haverhill for keeping a common nuisance. Trial in the Superior Court, before *Sherman*, J., who, after a verdict of guilty, reported the case for the consideration of the full court. The facts appear in the opinion.

E. B. Fuller, for the defendant.

A. E. Pillsbury, Attorney General, for the Commonwealth.

LATHROP, J. This is a complaint under the Pub. Sts. c. 101, §§ 6, 7, for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors on August 1, 1890, and on divers other days and times between that day and September 16, 1890.

At the trial in the Superior Court, on appeal, the government relied upon sales made by the defendant of several bottles of intoxicating liquors on August 15, 1890, at the place mentioned in the complaint.

It was admitted, for the purposes of the case, that the defendant was the agent of certain wholesale dealers in New York, who shipped liquors to him in bottles, packed in barrels and boxes securely nailed up; that he unpacked the bottles therefrom and sold and offered them for sale; and that he sold no other liquors.

The defendant asked the judge to rule that these facts justified him in keeping and selling the liquors mentioned. The judge refused so to rule; the jury returned a verdict of guilty; and the judge reported the case for the determination of this court.

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At the argument, the defendant contended:

1. That each bottle of liquor constituted an original package, which he had a right to sell under the decision of the Supreme Court of the United States in the case of *Leisy* v. *Hardin*, 135 U. S. 100.

2. That the U. S. St. of August 8, 1890, is unconstitutional. This act provides "that all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

3. That, by the true construction of this statute, it has no force or effect in any State until such State has enacted new laws.

The statute under which the defendant was convicted was enacted in the exercise of the police powers of the Commonwealth. *Commonwealth* v. *Intoxicating Liquors*, 115 Mass. 153; *S. C., nom. Beer Co.* v. *Commonwealth*, 97 U. S. 25. By the express terms of the U. S. St. of August 8, 1890, intoxicating liquors brought into a State are not exempt from the operation of such laws, whether introduced in original packages or otherwise. Unless, therefore, the defendant can maintain the affirmative of his second and third contentions, he shows no justification for his acts.

Since the argument of this case, the Supreme Court of the United States has decided that the U. S. St. of August 8, 1890, is constitutional, and has effect in a State without a subsequent re-enactment of its legislation on the subject of intoxicating liquors. *In re Rahrer*, 140 U. S. 545. As this decision is binding upon us, and is conclusive of the questions raised by the defendant, further consideration of them is unnecessary; and we need not determine whether, independently of the statute, the case falls within the decision of *Leisy* v. *Hardin*, *ubi supra*.

Judgment on the verdict.

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JOHN J. WILLIAMSON *vs.* WARREN S. HILL.

Suffolk. March 3, 1891. — June 25, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Contract of Sale — Conditional Agreement — Demurrer.

A contract in writing, dated April 26, 1887, for the sale by W. to H. of letters patent for a manufacturing process not yet made a commercial success, stipulated as one of the conditions of sale that H. or his assigns should pay to W., his heirs or assigns, $2,500 in one year from May 1, 1887, and on the same day in years following other sums with that aggregating $250,000, "it being understood and provided" that, if any such payment when due and demanded was not paid or tendered within sixty days after such demand, the contract was to be void. The contract also provided that H. might at any time within twenty years of May 1, 1887, pay $100,000 to W., and acquire a complete title to the patents, and, further, that H. might assign it to any person or corporation subject to the conditions of payment, and if such assignee should make payment "at or before the conclusion of any calendar year," or should "make the special single payment on or before May 1, 1889, as above stipulated," the sale was to inure to his or its benefit, otherwise the contract was to determine. The first payment mentioned in the contract was duly demanded of H. on May 1, 1888, and was not paid by him within the time limited, and an action was brought against him by W. to recover the same. *Held*, that the contract did not constitute an absolute sale to the defendant, but merely secured to him certain rights in the patent, which were to be kept alive by annual payments or lost by failure to make the same; and that the action could not be maintained.

CONTRACT. The declaration alleged that the plaintiff made a contract in writing with the defendant, for a good and valuable consideration, on April 26, 1887, a copy of which was annexed to the declaration, in and by which the defendant undertook to pay to the plaintiff, his heirs or assigns, the sum of $2,500 in one year from May 1, 1887, and, further, in case this payment became due and was demanded and not made or tendered within sixty days of such demand, the contract was to be void and of no effect from the date so determined; that such payment of $2,500 became due and was duly demanded on or about May 1, 1888, and was not made or tendered within the time limited, that is to say, on or before July 5, 1888; that the defendant had not assigned the contract, but in pursuance of the provisions thereof had returned to the plaintiff the assignment of the patents re-

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ferred to in the contract annexed and theretofore made by the plaintiff; "and that the executory part of said contract annexed has been forfeited and rescinded, but that the payment of twenty-five hundred dollars ($2,500) therein referred to, is still due." The copy of the contract annexed to the declaration, which was dated April 26, 1887, and was under seal and signed by the plaintiff and the defendant, was as follows:

"Whereas John J. Williamson, of Boston, in the county of Suffolk and State of Massachusetts, has heretofore obtained letters patent of the United States and Canada for certain electric conducting wires, and for the method or process of manufacturing said wires, which letters patent are of date, number, and title as follows, viz." Here followed a list of four United States patents, three of which were issued in April and June, 1884, of one Canadian patent, and of an application then pending for a United States patent, with the date, number, and title of each. "Whereas said Williamson is desirous that the aforesaid inventions and methods of manufacture shall be manufactured and put in use; and whereas Warren S. Hill, of Hyde Park, in the county of Norfolk and State of Massachusetts, is desirous of acquiring the aforesaid inventions and the exclusive right to manufacture and sell under the said patents, —

"Now this agreement witnesseth: that for the consideration of one dollar ($1) paid by said Warren S. Hill to said Williamson, the receipt whereof is hereby acknowledged, and for other valuable considerations hereinafter specified, said Williamson contracts and agrees to assign, sell, and set over, and by these presents does hereby assign, sell, and set over unto said Warren S. Hill, his heirs and assigns, all the said letters patent now granted to him as hereinbefore described and enumerated, and also the United States letters patent which have been applied for (if allowed), viz. of serial number 137,262, filed July 9, 1884, entitled 'Electrical conductors or for the manufacture thereof.' And said Williamson further agrees to assign, sell, and set over unto said Warren S. Hill, his heirs and assigns, any inventions or improvements he may hereafter make in electric conducting wires, and all patents that may hereafter be obtained by him in the United States and the Dominion of Canada for electric conducting wires, composed of copper and steel or iron, or copper

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and copper compounds, so long as the terms of this contract and agreement shall be fulfilled, and during the life or term of existence of the hereinbefore named letters patent. And said Williamson agrees to take out letters patent for all such inventions and improvements as he may hereafter make in electric conducting wires, and assign the same to said Hill or his assigns, provided the said Hill or his assigns shall pay the customary expenses incurred in obtaining said letters patent. And it is further expressly agreed, that if the said Williamson shall make any invention or improvement in said electric conducting wires, and shall neglect or refuse to make due application for letters patent thereon, and to assign said inventions and improvements and the letters patent obtained thereon to said Hill or his assigns, then and in that case all the payments hereinafter mentioned which shall then be due, or shall thereafter become due, shall be retained by said Hill or his assigns until such applications and assignments shall have been made by said Williamson; and the failure to make payments, hereinafter provided, during all such time as the said Williamson shall so neglect or refuse, shall not work a forfeiture of this agreement, or give the said Williamson any remedy hereunder.

"The conditions of sale, and the payments to be made, and the times and mode of so making them are hereinafter expressly stipulated as follows. Said Warren S. Hill, or his assigns, shall pay to said Williamson, his heirs or assigns, the sum of twenty-five hundred dollars in one year from the first day of May, A. D. 1887." Here followed a list of thirteen prospective payments, the first to be made in two years from that date, and the last in fourteen years therefrom, in all amounting, if the $2,500 be included, to $250,000. "It being understood and provided, that in case any of the aforesaid payments being due and having been demanded, and such payment be not made or tendered within the sixty days next succeeding such demand, (except as is hereinbefore provided,) then and in that case this contract and agreement and sale shall be null and void and of no effect from the date so determined, and the patents shall revert to said Williamson or his assigns, discharged of any obligations of whatever nature due to this contract, and of any rights to manufacture thereunder. The said payments are to be made to said William-

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son, or his assigns, or to his or their duly authorized agent in that behalf, at such place as he or they may from time to time designate; and to that end said Williamson or his assigns covenant to furnish from time to time to the said Hill or his assigns the information of any change of residence that he or they may make, or any assignment he may make of his interest in the payments to be made as hereinbefore stipulated. If said Williamson or his assigns direct such payments to be made to him at any place outside of the city of Boston, Mass., a deposit of said amount in some legal depository of trust funds in the city of Boston, to the credit of said Williamson or his assigns, shall be taken and deemed a full and perfect compliance with the terms of payment herein provided for. If said Williamson or his assigns shall change his or their address, and not notify the said Hill or his assigns, then and in that case a failure to make the above named payments within the time mentioned shall not work a forfeiture of any rights under this agreement.

"It is also agreed, that if the said Hill or his assigns shall, in the manner above provided, pay or cause to be paid, or shall tender to said Williamson or his assigns, the sum of one hundred thousand dollars in cash, at any time within two years from the first day of May, A. D. 1887, the said Williamson or his assigns shall accept the same in full payment and satisfaction of all the payments to be made hereunder, and of all the obligations herein to be performed on the part of said Hill or his assigns; and the said sum shall also be accepted and received in full payment of all the above named letters patent, and of all such letters patent as the said Williamson shall hereafter make application for within the United States and Dominion of Canada, relating to electric wires, as above provided; and upon the tender in good faith of the sum of one hundred thousand dollars in cash, as above provided, to said Williamson or his assigns, within two years from May 1, 1887, by said Hill or his assigns, the title to all such patents heretofore described shall pass absolutely to said Hill or his assigns, discharged of all future payments.

"Said Warren S. Hill may assign this agreement, subject to all the conditions of payment, to any person or corporation; and in case of the payment by such assigns or their assigns, or their

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successors in interest, at or before the conclusion of any calendar year, or shall make the special single payment on or before May 1, 1889, as above stipulated, the sale hereby provided for shall inure to the benefit of such assigns or persons having his or their title. But in case such payments be not made, this agreement ceases and determines, as hereinbefore provided."

Writ dated January 7, 1889.

In the Superior Court the defendant demurred, on the ground that the declaration did not set forth a legal cause of action, "for it appears from the said declaration and the copy of the contract thereto annexed that the said contract became and was null and void long before the time of the bringing of the plaintiff's action, and that nothing is due thereunder."

The case was then tried, before *Dunbar*, J., who allowed a bill of exceptions, in substance as follows.

The bill recited that, at the hearing on the demurrer, the same "was overruled, and that the defendant excepted to the decision overruling the demurrer," without more.

The bill also recited that "it appeared by the evidence that the sum of twelve hundred and fifty dollars was paid to the plaintiff, at or about the time of the execution of the contract, by one Edwin S. Thayer, and at the same time, or shortly after, the plaintiff paid two hundred and fifty dollars of this sum to the defendant Hill, in pursuance of a verbal agreement had by the plaintiff and defendant before the time of the execution of the contract; and that in all the negotiations between the plaintiff and defendant concerning the making of the contract, the plaintiff insisted on a payment being made to him at the time of the execution of the contract, and the payment was made at such time in pursuance of this agreement, which was not contained in the contract; and by such agreement it was understood that twelve hundred and fifty dollars should be paid to the plaintiff at the time of the delivery of the contract, and that two hundred and fifty dollars of that money should be paid back by the plaintiff to the defendant Hill." The wire had not been manufactured for the market, nor had it been put into any use, except for the purpose of testing its mechanical and electrical qualities, and there was evidence tending to show that this had been done to some extent, with a small quantity of wire, by the electrician

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of a telegraph company. The defendant testified that the plaintiff had been, for some years before the execution of the contract, trying to get some one to undertake the manufacture of the wire referred to in the contract; and that on one occasion previously he in connection with another person had had a contract with the plaintiff concerning the purchase of the patents, which had run out. It was conceded by the defendant that the twenty-five hundred dollars which was sought to be recovered in this action had not been paid; but he contended that the payment of twelve hundred and fifty dollars made by said Thayer to the plaintiff had been accepted by the plaintiff in lieu thereof, and this question was submitted to the jury, under instructions to which no exception was taken.

The judge refused to instruct the jury, as requested by the defendant, that it was optional with the defendant whether to pay the sum of twenty-five hundred dollars stipulated in the contract to be paid on May 1, 1888, or not, and that it was his right to refuse to pay such sum, and that if he chose to continue such refusal for sixty days after the demand was made for the payment of said sum, the contract was thereby rendered null and void, and the plaintiff could not recover the twenty-five hundred dollars sued for in this action; but instructed them that, by a true construction of the contract, twenty-five hundred dollars became due on May 1, 1888, and that then the plaintiff was entitled to make demand for such sum, and that, if payment of the same were not made within sixty days next succeeding such demand, the contract would be rendered null and void as to all future payments, but not as to the twenty-five hundred dollars sued for in this action.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The case was argued at the bar in March, 1891, and afterwards was submitted on the briefs to all the judges, except *Barker*, J.

C. M. Barnes, for the defendant.

T. W. Clarke, for the plaintiff.

KNOWLTON, J. The plaintiff was the owner of certain letters patent, and of an invention on which letters patent had been applied for, all for methods or processes of manufacturing elec-

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trical conducting wires. On April 26, 1887, he made a contract in writing with the defendant to sell these letters patent and inventions, and stipulated also to sell and convey any other letters patent which he should obtain or inventions which he should make for wires of similar materials during the term mentioned in the contract. The contract proceeds in the following language:

"The conditions of sale, and the payments to be made, and the times and mode of so making them are hereinafter expressly stipulated, as follows. Said Warren S. Hill, or his assigns, shall pay to said Williamson, his heirs or assigns, the sum of twenty-five hundred dollars in one year from the first day of May, A.D. 1887." Then follows a statement of sums to be paid annually on the first day of May, for fourteen years from May 1st, 1887, amounting in all, including the $2,500, to $250,000. "It being understood and provided, that in case any of the aforesaid payments being due and having been demanded, and such payment be not made or tendered within the sixty days next succeeding such demand, (except as is hereinbefore provided,) then and in that case this contract and agreement and sale shall be null and void and of no effect from the date so determined, and the patents shall revert to said Williamson, or his assigns, discharged of any obligations, of whatever nature, due to this contract, and of any rights to manufacture thereunder." The next clause relates to the places where the payments are to be made. The next stipulates that the defendant or his assigns may at any time within two years from the first day of May, 1887, make payment or tender of payment of $100,000 in cash to the plaintiff, and that the plaintiff shall receive the same, and the title to all such patents "shall pass absolutely to said Hill or his assigns, discharged of all future payments." The last provision is as follows: "Said Warren S. Hill may assign this agreement, subject to all the conditions of payment, to any person or corporation; and in case of the payment by such assigns or their assigns, or their successors in interest, at or before the conclusion of any calendar year, or shall make the special single payment on or before May 1, 1889, as above stipulated, the sale hereby provided for shall inure to the benefit of such assigns or persons having his or their title. But in case such payments be

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not made, this agreement ceases and determines, as hereinbefore provided."

The action is brought to recover the first payment mentioned in the contract, which was duly demanded soon after May 1, 1888. At the trial, "it appeared by the evidence that the sum of twelve hundred and fifty dollars was paid to the plaintiff, at or about the time of the execution of the contract, by one Edwin S. Thayer, and at the same time, or shortly after, the plaintiff paid two hundred and fifty dollars of this sum to the defendant Hill, in pursuance of a verbal agreement had by the plaintiff and defendant before the time of the execution of the contract; and that in all the negotiations between the plaintiff and defendant, concerning the making of the contract, the plaintiff insisted on a payment being made to him at the time of the execution of the contract, and the payment was made at such time in pursuance of this agreement, which was not contained in the contract; and by such agreement it was understood that twelve hundred and fifty dollars should be paid to the plaintiff at the time of the delivery of the contract, and that two hundred and fifty dollars of that money should be paid back by the plaintiff to the defendant Hill." It also appeared that at the time the contract was made the wire had not been manufactured for the market, nor put to any use except for the purpose of testing its mechanical and electrical qualities, and there was uncontradicted evidence that the plaintiff had been, for some years before the execution of the contract, trying to get some one to undertake the manufacture of the wire, and that on one occasion previously he had made a contract with the defendant concerning the purchase of the patents, which had run out.

The question before the court is, What is the true construction of the contract in regard to the payments mentioned in it? Was it an absolute sale, and did the defendant become bound absolutely to pay the sum of $250,000, or was it a contract which merely secured him rights in the patents, on his making payments from time to time, so long as he continued to pay in accordance with the contract? The defendant contends that the purpose of the contract was to enable him to experiment with the patents, and to endeavor to obtain a purchaser for them, and that the payment of twelve hundred and fifty dollars

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by Thayer, who testified that he was interested in the purchase of the patents, was to secure to the defendant rights in them for one year, and that at the end of the year he had his option either to pay twenty-five hundred dollars within sixty days after a demand by the plaintiff, and thereby secure control of the patents for another year, or to decline to pay, and so make the contract "void and of no effect."

There can be no doubt that his failure to make the payment demanded terminated all his rights in the patents, and his liability for future payments. If such a failure had occurred several years later, after some of the payments had been made, it would have rendered the contract of no effect from that date; that is to say, so far as the contract had been completely executed in the making of payments it would remain in effect, but so far as it remained entirely executory, it would be terminated, and none of the payments provided for in the future could be collected. The only question of difficulty relates to the payment which had become due, either absolutely or conditionally, but remained unpaid. As to that, is the contract in force, so that it can be invoked for the collection of it? That depends on whether the payment had become absolutely due and payable before the contract became void.

It is worth while to inquire whether the parties intended this provision for the benefit of the defendant, as well as of the plaintiff. Was the defendant entitled to be free from all future liability by refusing to pay on demand, or could the plaintiff, if he saw fit, compel him to pay the whole sum of $250,000? The stipulation is absolute, that on the defendant's failure to pay, within sixty days after a demand, the contract shall become of no effect for the future; and, considering the nature of the contract, we cannot doubt that the parties intended to allow the defendant to avail himself of this provision at the end of any year, to relieve himself from future liability. This the plaintiff's counsel concedes in argument; but he says that the defendant could not relieve himself from liability for the payment which had been demanded, and which he contends had become absolutely payable on the first day of May. But the contract becomes void only after the expiration of sixty days from the plaintiff's demand for the payment; and if the plaintiff's con-

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struction were correct, following literally the terms of the contract, he would have nothing to do but to decline to make a demand, and at the expiration of a year the second payment would become due, and at the expiration of another year, with no demand, the third would become absolutely due, and so on, while the defendant would have no way of avoiding an absolute liability for the whole. To hold that each payment becomes absolutely due on the first day of May, when the contract says it shall be paid, is equivalent to holding that this provision of the contract is for the plaintiff only, and that the defendant has no option if the plaintiff sees fit to hold him as an absolute purchaser.

If we look critically at the contract, we notice that the stipulation for a payment on the first day of May in each year is only one of the "conditions of sale," and is qualified by the clause beginning, "it being understood and provided." When we look at the subject matter of the contract, the situation of the parties, the apparently experimental nature of the transaction, and the payment made by the defendant in advance, we think the parties intended that each payment should be made only in case the defendant wished to keep the contract in force for his benefit, and that he was to have sixty days after a demand in which to determine whether to pay or to allow the contract to become void except as to those parts which had been fully executed. If he failed to pay, the contract would become of no effect as to the payment demanded. This appears also by the last paragraph of the contract, which gives the defendant a right to assign "this agreement, subject to all the conditions of payment, to any person or corporation," and to be relieved from further personal liability upon it by substituting another in his place. On such an assignment, the assignee would be under no direct obligation to the plaintiff, and the plaintiff would have no remedies under the contract except as it gives him security on the patents. Yet it is stipulated that on payment by such assignee, or his assigns or successors in interest, "at or before the conclusion of any calendar year," etc., the sale provided for by the contract shall inure to his or their benefit. But if the payment be not made, the agreement ceases and determines, as before provided. Under this provision,

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it is clear that, if the contract should be assigned, the plaintiff could not recover a payment which should subsequently accrue and be demanded of the assignee; and the contract assumes that this part of it is identical in legal effect with that on which this action is brought.

We are of opinion, therefore, that the exceptions to the ruling at the trial should be sustained.

In passing on the demurrer to the declaration, we are obliged to consider the question presented without the benefit of the facts proved at the trial, and the solution of it is not easy. But in the contract itself, although it does not appear that the payment was made in advance, there is much to show the experimental nature of the transaction. The principal patents had been in existence about three years, as appears by the description of them, and one application for a patent was then pending, and the contract by its terms looked to future inventions to be made and patents to be obtained by the plaintiff, which were to be assigned to the defendant. Then the provision for assignment by the defendant "to any person or corporation," and the stipulation that a payment of $100,000 at any time within two years might stand instead of $250,000 to be paid year by year, indicate that this was not considered an absolute sale, with security back to the seller, but a grant of a privilege to be kept alive by annual payments, or lost on the failure to pay annually. We are of opinion that the demurrer should be sustained.

Exceptions sustained.

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COMMONWEALTH *vs.* PATRICK CLANCY.

Suffolk. March 30, 1891. — June 25, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Complaint — Municipal Court of Boston — Jurisdiction — Registering Bets — Pool Selling — Evidence.

It is not necessary to a conviction on a complaint under the St. of 1885, c. 342, § 1, that the defendant's business should embrace both registering bets and buying or selling pools; if it embraces one of them, it is within the statute; if it embraces more than one, it still may be one business and one offence.

A complaint addressed to the Municipal Court of the city of Boston charging the defendant, after the allegations of city, county, and State, with committing an offence "within the judicial district of said court," is sufficient as to place to give the court jurisdiction.

A complaint alleging that the defendant, in a certain room "occupied with apparatus, books, and devices . . . for the purpose of registering bets and selling pools upon the results of trials and contests of skill, speed, and endurance of men and beasts, was present then and there in said room engaged in the business and employment of registering bets upon the result of a certain trial of speed of beasts, to wit, upon the result of the racing of certain horses whose speed was to be tried by racing," charges an offence within the St. of 1885, c. 342, § 1.

On a complaint under the St. of 1885, c. 342, § 1, there was evidence that in the room in question, which contained an office, stood a blackboard with names and figures thereon, understood by a witness who had been there many times to be the names of horses and jockeys; that another witness copied from the blackboard certain names understood by him to be those of horses, and asked the defendant, who had been seen there repeatedly before marking on the blackboard, what he would give him on them, and the defendant answered twenty to one; that the witness then gave the defendant some money and the list of names, and the defendant went into the office, stopped a minute, returned and gave the witness a ticket with the words "Combination Play or Pay" printed at the top, and with "1st Race," "2d Race," etc., printed in a column underneath, and the names selected by the witness written against certain of the races thus: "1st Race, Picknicker ½," "7th Race, Tattler ½," etc., and at the bottom of the ticket was written "10/50." *Held*, that the evidence was sufficient to warrant a conviction.

A witness who testifies to a transaction as having taken place on a certain day may properly be allowed to refresh his recollection from memoranda made by him respecting the transaction on the night of that day.

At the trial of a complaint on the St. of 1885, c. 342, § 1, for being present in a room engaged in the business of registering bets, the presiding judge, in giving an instruction requested by the defendant, added that the defendant was as liable for what he directed others to do illegally in his presence as if he did it himself, and refused to instruct them, as the defendant requested, that if the defendant made a bet and another registered it, or if the jury found that the transaction in evidence was selling pools, the defendant was not liable. *Held*, that the defendant had no ground of exception.

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COMPLAINT, in two counts, to the Municipal Court of the city of Boston. The second count differed from the first count only in respect to the time alleged. The first count was as follows: "To the Justices of the Municipal Court of the city of Boston, holden at said Boston for the transaction of criminal business, within the county of Suffolk: Henry Chase of the city of Boston in the county of Suffolk, in behalf of the Commonwealth of Massachusetts, on oath complains that Patrick Clancy of said Boston, on the twenty-fifth day of June in the year of our Lord one thousand eight hundred and ninety, at Boston aforesaid, and within the judicial district of said court, with force and arms, in a certain room situate in said city and district, and then and there occupied with apparatus, books, and devices, a further description of said apparatus, books, and devices being to said Chase unknown, for the purpose of registering bets and selling pools upon the results of trials and contests of skill, speed, and endurance of men and beasts, was present then and there in said room engaged in the business and employment of registering bets upon the result of a certain trial of speed of beasts, to wit, upon the result of the racing of certain horses whose speed was to be tried by racing."

In the Superior Court, on appeal, before the jury were impanelled, the defendant renewed a motion filed by him in the Municipal Court to quash the complaint for the following reasons, which alone are material: "1. No offence at common law or under the statute is charged. . . . 3. That part of the city of Boston in which the rooms charged are situated is not set out or described or located by description, the jurisdiction being merely asserted in each count. 4. The selling of pools and registering of bets is not charged in either count as the business employment. 5. Nor the name of the keeper or occupant of the rooms set out or charged, nor charged as being unknown to the complainant, nor the time, place, or name when, where, or by whom the speed and endurance of the horses and beasts is to be tried and contested, set out or charged as unknown." *Barker*, J. overruled the motion, and the defendant excepted.

The defendant was then tried, and one Randall, a witness for the government, testified that on June 25, 1890, he visited the room in question and there saw the defendant; that the room

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contained blackboards and two offices, and the defendant was standing on a platform in front of the blackboards; that he stood in front of the blackboards a few minutes, and wrote the names Picknicker, Tenney, Beck, and Tattler on a paper, and asked the defendant what he would give him on them; that the defendant said, "I will give you twenty to one"; that he gave the defendant some money, which the defendant took with the paper into one of the offices, and came back with the change in front of the blackboard, and gave it to him, and he then went to the office and another man gave him a ticket; that he had been in the room ten or twelve times, some of the times before June 25; that one Lent was with him that day; that aside from the defendant's taking this money and giving him change, he saw the defendant marking at the blackboard, — what he did not now know; and that the names written on the paper and given by him to the defendant were names of horses so far as he knew. On cross-examination, Randall testified that before he spoke to the defendant he had the names of horses written on a paper, and handed that paper to the defendant. In answer to the question, also put to him on cross-examination, "You wrote these four names on a ticket without knowing of your own knowledge whether they were the names of horses, yachts, engines, or anything else, handed it to him, and said, 'How much will you give me on this?'" Randall replied, "I cannot say positively that they were names of horses, but understood they were names of horses." He also testified that he had been in there prior to June 25, and had got acquainted with Clancy, and had never seen him sell or offer to sell a ticket that he remembered of; that at the times when he was in there Clancy was engaged in marking on the blackboard something that was called out; that he gave him $2.00 and got $1.50 back; that Clancy stopped in the office a minute or so before giving him the change, and brought the change back; that when Clancy came out he then went into the office, and got the ticket, not from the defendant, but from some one else; that he saw no one else give any money to the defendant, or give money to make a stake against witness; that he heard no one offer to bet with him; that he saw no money put up; that nobody stated to him the terms of any bet; that no one told him that Pick-

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nicker or Tattler was running a race, or name other horses running with them; and that he saw no person make any record in writing of any race between horses or anything that day.

Lent was called as a witness for the government, and testified that he went with Randall on June 25, and saw Randall write on paper and hand the paper to the defendant, and ask what he would give, and saw him take the paper and money into a little office and return with the change, which he gave to Randall; that in a few moments Randall went to the ticket-hole in the office; that while Randall and the defendant were talking about change, he saw a man in the office writing on the ticket which Randall took; that he saw columns of names and figures on the blackboard which he took to be horses and jockeys' names; and that he had been there at other times.

The ticket given by the defendant to Randall was in evidence. It was printed on pasteboard, and was about two and a half inches wide by four inches long. At the middle of the top, printed in plain type, were the figures 326, beneath which in one line was the letter T, followed by the word "Combination," and in a second line the words "Play or Pay." Under these and to the left was printed in a column, "1st Race," "2d Race," etc., up to "8th Race," and filling the spaces opposite respectively, "1st Race," "3d Race," "5th Race," and "7th Race," were written with a lead pencil the names "Picknicker ½," "Beck ½," "Tenney ½," "Tattler ½." At the bottom appeared the figures "10/50," written with a lead pencil.

Randall was allowed to refresh his recollection from memoranda made mostly from memory by him on the night of June 25, after the transaction; and the defendant excepted.

The defendant requested the judge to rule that there was no evidence upon which the jury could find the defendant guilty of the offence charged; the judge refused so to rule, and instructed the jury that there was evidence for them to consider upon the complaint; and the defendant excepted.

The defendant also requested the judge to give, among others, the following instructions to the jury: "5. The evidence must show beyond a reasonable doubt that a registration of a bet was made by the defendant, or the jury should acquit; that the defendant was engaged as a business and employment in the registering of

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bets, of which the one shown in evidence is one of a series, or the jury should acquit. . . . 7. If the jury find that the defendant sold the ticket and made any bet, and the same was not recorded or registered by the defendant, but by some other person, the jury should acquit the defendant. 8. If the jury find that the transaction in evidence was selling pools, they should acquit."

The judge refused to give the seventh and eighth instructions requested, but gave the fifth, adding thereto: "Of course you have already learned that where illegal business is carried on, where more than one takes part, whatever one man does by directing others or instructing others in his presence, this is something for which he is as liable as if he did it himself."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

T. J. Morrison, for the defendant.

A. E. Pillsbury, Attorney General, for the Commonwealth.

HOLMES, J. The motion to quash was properly overruled. The complaint charges an offence under the St. of 1885, c. 342, § 1. That statute makes it criminal to be present in a room occupied with apparatus, books, or devices for the purpose of registering bets, or of buying or selling pools, upon the result of a trial of the speed of beasts, etc., engaged in the business of registering bets, or of buying or selling pools upon the result of a trial of the speed of beasts, etc. It is not necessary that the defendant's business should embrace both registering bets and buying or selling pools. If it embraces one of them, it is within the letter and the intent of the statute. If it embraces more than one, it still may be one business and one offence. *Commonwealth* v. *Ferry*, 146 Mass. 203, 208. *Commonwealth* v. *Moody*, 143 Mass. 177.

As the jurisdiction of the Municipal Court of the city of Boston does not extend to the whole city, it is necessary to allege the place more particularly than otherwise would be sufficient. We are of opinion that the established formula, "within the judicial district of said court," following the allegations of city, county, and State, is sufficient to give the court jurisdiction. *Commonwealth* v. *Hoar*, 121 Mass. 375. If it is in a sense a conclusion of law, so are many allegations of pleading. *Winsmore* v. *Greenbank*, Willes, 577, 583. *Windram* v. *French*, 151

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Mass. 547, 551. Evans, Pl. 138, 139, 143, *et seq.* Evans, Pl. (2d ed.) 147, 152, *et seq.* But if the district had had a proper name, and had been designated by it, probably no one ever would have questioned that the allegation was one of fact, and sufficient. 2 Battle's Dig. 729, pl. 1. In its present form it is an issuable allegation. *United States* v. *Anderson*, 17 Blatchf. 238. *United States* v. *Jackalow*, 1 Black, 484, 487. It is equivalent to an allegation that it was within some one of the wards mentioned in the Pub. Sts. c. 154, § 42, defining the judicial district in question, and it gives the same information as if couched in that form. *People* v. *Breese*, 7 Cowen, 429, 430. Those wards are established by statute. St. 1886, c. 283. St. 1888, c. 437. The other objections insisted upon are disposed of by *Commonwealth* v. *Ferry*, 146 Mass. 203.

The next question is whether there was any evidence warranting a verdict against the defendant. There can be no doubt that the transactions described by the witnesses purported to be the registering of a bet on the result of certain horse races, or that the room was occupied with apparatus for that purpose. There stood in the room blackboards with names and figures, understood to be names of horses and jockeys by a witness who had been there many times. Another witness copied from the blackboard certain names which he understood to be names of horses, and asked the defendant what he would give him on them. The defendant answered twenty to one. The witness gave the defendant some money and the list of names, and the defendant went into the office, stopped a minute, returned and gave the witness his change, the sum paid by the witness being half a dollar, and then another man in the office gave the witness a ticket with the words "Combination Play or Pay" printed at the top, then the words "1st Race," "2d Race," etc., printed in a column, and the names selected by the witness written against certain of the races thus: "1st Race, Picknicker ½," "7th Race, Tattler ½," etc. At the bottom was written "10," and then, separated by a line, "50," which it would not be a very violent conjecture to take as signifying the combination and the sum paid by the witness. If the jury found that this transaction purported to be a bet on a horse race, they were warranted in finding that the defendant understood that it purported to be so, and by the part he took in it admitted and affirmed that

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there were horses of the names given, and that they were expected to take part in races. Therefore the defendant cannot escape on the ground that the witnesses never had seen the horses of these names. It is plain that the blackboards and printed tickets were kept in the rooms for the purpose for which they were used on this occasion. The defendant had been seen there before repeatedly, marking on the blackboards, it may be inferred for the same purpose. It does not matter that he did not fill out the ticket personally. The testimony showed that he directed it to be filled out. Filling out the ticket was registering a bet, whether the memorandum was more or less intelligible. It is not a question of satisfying a statute like the statute of frauds, but of making a memorandum intended by the parties to be a minute of a bet. The statutory offence was proved if the witnesses were believed.

The witness was properly allowed to refresh his memory from memoranda made by him on the night of the transaction. *Commonwealth* v. *Ford*, 130 Mass. 64.

The refusal of certain requests for rulings calls for little remark. The offence charged is being present in the room engaged in the business of registering bets. Any one taking part in transactions having for their object and result registering bets is engaged in the business, and most plainly so, when, as the jury might have found here, what he does not do in person he commands or procures to be done. The seventh request, therefore, was properly refused, and the additions to the fifth excepted to were correct. The eighth was properly refused. We are told that it is common knowledge that registering bets is an alternative system, which is taking the place of selling pools. But we suppose that selling pools is betting, and that issuing a memorandum of the sale is technically registering a bet, whatever may be the distinction in the language of those engaged in the business. Moreover, if we should assume to know all that was stated at the bar as common knowledge, we should have some difficulty in seeing any ground for the suggestion that the transaction could have been found to be selling a pool. The jury were required to find that the defendant was engaged in the business of registering bets, and registering bets was defined to them in the words of the defendant's counsel.

Exceptions overruled.

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COMMONWEALTH *vs.* THOMAS WATSON.

Suffolk. March 30, 1891. — June 25, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Complaint — Jurisdiction of Municipal Court — Evidence — Registering Bets — Pool Selling.

It is not necessary, to constitute an offence under the St. of 1885, c. 342, § 1, that the defendant's business should embrace both registering bets and buying or selling pools; if it embraces one of them, it is within the statute; if it embraces more than one, it still may be one business and one offence.

A witness who testifies to a transaction as taking place on a certain day may be allowed to refresh his recollection from a memorandum of the transaction made by him on the night of that day.

A complaint, addressed to the Municipal Court of the city of Boston, charging the defendant, after the allegations of city, county, and State, with committing an offence "within the judicial district of said court," is sufficient as to place to give the court jurisdiction.

A complaint alleging that the defendant, in a certain room "occupied with apparatus, books, and devices . . . for the purpose of registering bets and of selling pools upon the results of trials and contests of skill, speed, and endurance of men . . . and upon the results of games and competitions, was present then and there in said room engaged in the business and employment of selling pools upon the result of a certain game, the same being a trial and contest of the skill of men, to wit, a game of base-ball, to be played by men," charges an offence within the St. of 1885, c. 342, § 1.

On a complaint for being present in a room, occupied with apparatus for the purpose of selling pools upon the results of games and competitions, engaged in the business and employment of selling pools upon results of games of base-ball, there was evidence that in the room were blackboards with rows of names, numbered from one to sixteen, understood by a witness to indicate certain base-ball clubs, each row being different from the other. A witness testified that he asked the defendant for No. 10, which read "Brook., Pitts., Cleve., Phila.," paid some money and received a ticket with 10,456 printed on it and 10 pencilled underneath; and that afterwards he saw the defendant and asked him if combination 10 had won, to which the defendant answered, No. The witness was then permitted to testify that "combination 10" meant the four names in the row numbered 10, and that, as far as he knew, the names signified base-ball clubs. *Held*, that the defendant had no ground of exception.

Two of the witnesses testified that the transaction was a pool, although they saw no fund, and did not know of other persons making wagers at the time. The presiding judge refused to rule that there was no evidence to warrant a conviction, and also that certain specified transactions were wagers in pools; but instructed the jury that he did not suppose all betting was selling pools, defined pools in accordance with a decision of this court, with amplifications, and directed them, unless they found that the defendant was thus engaged in the business of selling pools, that they must acquit him. *Held*, that the defendant had no ground of exception.

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COMPLAINT, addressed to the Municipal Court of the city of Boston, alleging that "Henry Chase of the city of Boston in the county of Suffolk, in behalf of the Commonwealth of Massachusetts, on oath complains that Thomas Watson at Boston aforesaid, and within the judicial district of said court, with force and arms, in a certain room situated within said city and district, which said room was then and there occupied with apparatus, books, and devices, a further description whereof is to said Chase unknown, for the purpose of registering bets and of selling pools upon the results of trials and contests of skill, speed, and endurance of men, beasts, birds, and machines, and upon the results of games and competitions, was present then and there in said room, engaged in the business and employment of selling pools upon the result of a certain game, the same being a trial and contest of the skill of men, to wit, a game of base-ball, to be played by men."

In the Superior Court, on appeal, before the jury were impanelled, the defendant renewed a motion filed by him in the Municipal Court, to quash the complaint, on the following grounds: "1. No offence at common law or under the statute is charged. 2. That the part of the city of Boston in which the room charged is situated is not described or set out or located by description, the jurisdiction being merely asserted. 3. The selling of pools and registering of bets is not charged as the business and employment. 4. Nor the name of the keeper or occupant of the room charged set forth or charged, nor charged as being unknown to the complainant. 5. Nor when, where, or by whom the game of base-ball charged was to be or was played." *Barker*, J. overruled the motion.

At the trial there was evidence that the room in question contained a small box office, a number of settees, and two blackboards on which were written names, as Washington, Pittsburgh, New York, and Philadelphia; that across the top of one of the blackboards was written the word "Brotherhood"; that at the left edge of this blackboard was a column of figures running from 1 down to 16; that opposite each number were written four abbreviations of names, those in the first line as read from left to right being "Buff., Pitts., Cleve., Chic.," and in the second line the first three of these repeated with the

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addition of "Phila.," and opposite the figure 10, "Brook., Pitts., Cleve., Phila." One Randall, a witness for the government, testified that on July 1, 1890, he visited the room, having been there several times during the month before; that the defendant was standing on the floor, and he went up to him and asked him for No. 10, and gave him some money; that the defendant said nothing, but went into the office and immediately returned and gave him a ticket, at the top of which was printed "10,456," and underneath, the figure 10 was written with a lead pencil; that afterwards he saw the defendant and asked him "if combination 10 had won"; and that he knew that the transaction in which he participated was a pool, but did not know of any other person making a wager at the time. To the question, "What did combination 10 mean?" this witness was permitted, against the defendant's objection, to answer, "It is four names placed on the blackboard right along in a row; that is a combination, and there are sixteen of these rows, four names in each row. They are different. Ten is one special row." To the question, "What do these names on the blackboard signify?" he was permitted, under like objection, to answer, "As far as I know they signify base-ball clubs." And the defendant excepted.

One Lent testified that he accompanied Randall on his visit to the room in question, that he knew that the transaction participated in by Randall and the defendant was a pool, but that he did not see any fund of money, but knew that there was one, and understood that the defendant held it and made payments from it; that he did not know of anybody else participating in the transaction; and that on the same night after he got home he made a memorandum on a slip of paper of the position of the numbers and names on the blackboard. This witness was then allowed, against the defendant's objection, to use this memorandum to refresh his recollection; and the defendant excepted.

The defendant requested the judge to instruct the jury as follows: "1. There is no evidence in this case upon which the jury can find the defendant guilty of the offence charged. . . . 3. Also, that equal or unequal amounts risked against other equal or unequal amounts by or between one or more, one or more to

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be determined by the result of an uncertain event, or series of uncertain events, is not a pool. It is a wager. 4. Also, that if the jury find from the evidence that the paper in evidence was part of a transaction by which Randall was to receive any definite amount of money in case the Brooklyn, Pittsburgh, Cleveland, and Philadelphia base-ball clubs should all win in certain contests between themselves and some other club, which were to be played at any certain time, or about July 1, 1890, and should not win or receive any money if either one of said clubs should fail of winning in such contest, and that the sole business and employment in which the defendant was engaged was in making like wagers with customers, of which the transaction with Randall was one of a series, that is a variance, and the jury should find a verdict of not guilty."

The judge refused so to instruct, but instructed the jury, among other things, as follows: "It is not necessary to prove that he sold any particular pool. It is not necessary to show just exactly what was done in that place every day. The charge is not for keeping the place, nor for selling pools, but for being in such a place engaged in the business of selling pools. Where an uncertain event or series of uncertain events are so combined, and all stakes are so combined as to go to the winner, that is a pool; and I also give you the instruction that a pool, generally speaking, is a combination of stakes, and within the meaning of the law a pool is money that has been paid in by those who have bought a right in it, and which is to be paid over to the winner if he gets the right number in a game of chance. "Pool" is a word of common acceptance. You see it in the newspapers, and hear it in common conversation, and you know its definition, very likely, and what its acceptation when applied to the business of selling pools in the community. I do not suppose all betting is selling pools, but certainly those things are pools which I have defined. If you believe there was this place on July 1, fitted up as charged in the complaint, and the defendant was there engaged in the business of selling pools, you should find him guilty. If you are not satisfied of this, you should find him not guilty."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

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T. J. Morrison, for the defendant.

A. E. Pillsbury, Attorney General, for the Commonwealth.

HOLMES, J. The motion to quash, and the exception to allowing the witness to refresh his memory from a memorandum made by him on the night of the transactions testified to, are disposed of by the case of *Commonwealth* v. *Clancy*, *ante*, 128. In the present case the defendant is complained of for being present in a room occupied, etc., and engaged in the business and employment of selling pools upon the result of a game of base-ball. It is unnecessary to state the evidence in detail. In the room were blackboards with rows of four names, understood by the witnesses to be names or abbreviations of names of base-ball clubs, each row being different from the others, and the rows being numbered from 1 to 16. One witness asked the defendant for No. 10, which read, "Brook., Pitts., Cleve., Phila.," paid some money, and received a ticket numbered 10,456 in print, with 10 upon it in pencil. Afterwards he saw the defendant, and asked him if combination 10 had won, to which the defendant answered, No. The first exception is to allowing this witness to testify that combination 10 meant the four names in the row numbered 10, and that, as far as he knew, the names signified base-ball clubs. If the jury were not warranted in inferring as much without evidence, we are of opinion that the witness who bought the ticket, and who had been at the place a number of times, might be found by the judge to be qualified to testify to the meaning of the words used by himself and the defendant. Certainly we are far from being able to say that the finding was clearly wrong. *Nunes* v. *Perry*, 113 Mass. 274, 276. *Commonwealth* v. *Sturtivant*, 117 Mass. 122, 137.

A ruling was asked that there was no evidence warranting a conviction; also that certain specified transactions were wagers, not pools. These were refused, but the judge instructed the jury that he did not suppose all betting was selling pools, defined pools as in *Commonwealth* v. *Ferry*, 146 Mass. 203, 208, with amplifications, and directed them that, unless they found the defendant was thus engaged in the business of selling pools, they must acquit him. The natural inference from the form of the transaction, the witness selecting a number and paying his money with nothing said as to the defendant's undertaking,

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would be that it was selling a pool, not making an ordinary bilateral wager. Two of the witnesses said that it was a pool. It is true that they saw no fund, and did not know of other persons making a wager at the time, but their testimony, if believed, carried conviction as to what the transaction purported, and therefore impliedly was admitted and affirmed by the defendant to be. The elements making up the implication would be difficult to reproduce, and yet there might be no doubt of the meaning understood by all concerned, even if there was not a word spoken.

We discover no error in the trial. *Exceptions overruled.*

ANDREW ROCHEFORT *vs.* INHABITANTS OF ATTLEBOROUGH.

Bristol. October 31, 1890. — June 26, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Defect in Highway — Actionable Negligence.

A town is not liable for an accident caused by a defect in a highway culvert so constructed that such a defect was likely to occur in the remote future, where the defect had not existed at the time of the accident for such a length of time as to make the town chargeable with notice thereof, and there had been no such defect in the way at that place for more than a year previously, although there was much heavy travel over the road.

TORT for personal injuries caused by an alleged defect in a highway which the defendant town was bound to keep in repair. Trial in the Superior Court, before *Hammond*, J., who reported the case for the determination of this court, in substance as follows.

The plaintiff was travelling in a carriage along the highway in question at six o'clock on the morning of February 9, 1889. The plaintiff's horse put his foot into a hole in the travelled part of the highway over a culvert, and fell, throwing the plaintiff out and causing the injuries complained of. There was no evidence that any hole had appeared over the culvert, except on the day of the accident, for over a year; and it appeared that

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the plaintiff and others had passed over the culvert on the night before, and had not seen any hole. The plaintiff contended that the culvert was so defectively constructed that in the use of the highway such a hole was liable to occur, and, against the defendant's objection, was allowed to introduce evidence tending to show that the sides of the culvert were built of rough stones put together without cement, and that the top was formed of common ledge stones laid across the opening and resting upon the sides so as to cover it, the top being covered with dirt about eighteen inches deep; that within the last six years two other holes similar to the one in question had appeared in the highway at a different place, but over the same culvert; that the more recent of these holes had been repaired something over a year before the accident; and that about two years before the accident the road surveyor had talked with one of the selectmen, and told him that a new culvert was needed, and the quicker the town got it done the better; and a resident living near the culvert who was present at the same conversation told the selectmen that the culvert was not safe, but the selectman had replied that the town could not afford to build a new culvert, and the matter was dropped. There was also evidence that the hole where the accident occurred, and also one of the earlier holes, appeared to be caused by one of the capstones slipping off from one side and dropping down; and that the heavy travel over the road might cause the covering stones to wear out at the edges and drop down and cause a hole similar to that in question. A witness for the plaintiff testified that, both before and after the two earlier holes had been repaired, he had travelled along the road at that point thousands of times, and with heavy loads.

The judge ruled that the plaintiff had failed to show any negligence for which the town was liable, and ordered a verdict for the defendant. If the ruling was wrong, the verdict was to be set aside, and the case stand for trial; otherwise, judgment was to be entered on the verdict.

The case was argued at the bar in October, 1890, and afterwards, in June, 1891, was submitted on the briefs to all the judges except *Morton*, J.

A. J. Jennings, for the plaintiff.

C. W. Clifford, for the defendant.

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ALLEN, J. The ground on which the plaintiff seeks to maintain his case is, that the culvert was built in an improper manner, so that the earth above it was likely to subside and make a hole in the road; and that under these circumstances greater diligence was required, on the part of the town authorities, in guarding against injury or damage to travellers than otherwise might have been sufficient. *Olson* v. *Worcester*, 142 Mass. 536. There was, however, no evidence that the hole which caused the injury to the plaintiff had actually existed for any such length of time before the accident as to make the town chargeable with notice thereof, and there had been no hole in the road at that place for more than a year previously, although there was much heavy travel over the road, and one of the plaintiff's witnesses went so far as to testify that he had himself driven heavy loads across there thousands of times. Under such circumstances, although the culvert was not so well built as to be likely to stand many years without repairs, it could not properly be held that the danger of a subsidence of the road was so imminent as to warrant holding the town chargeable with actionable neglect. It would throw too heavy a burden upon towns for the court, without more explicit legislation looking to that end, to hold them responsible merely because a road is so constructed that a defect therein of this character is likely to occur in the remote future. There was no apparent probability that the culvert would break down all at once, and without previous warning, thus making it dangerous to pass over it at all. *McGaffigan* v. *Boston*, 149 Mass. 289. *Adams* v. *Chicopee*, 147 Mass. 440. *Hanscom* v. *Boston*, 141 Mass. 242. *Post* v. *Boston*, 141 Mass. 189. In the opinion of a majority of the court, the entry must be,

Judgment on the verdict.

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WILLIAM W. VAUGHAN *vs.* STREET COMMISSIONERS OF BOSTON.

Suffolk. November 17, 1890. — June 26, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Tax — Executor and Administrator — Abatement.

An executor or administrator must not only make the return called for by § 88 of the Pub. Sts. c. 11, of the property in his hands liable to taxation, but must in addition, in case of a partial or total distribution, give notice thereof, under the Pub. Sts. c. 11, § 20, cl. 7, to the assessors, stating the names and residences of and the amount paid to the several parties interested who are residents of this Commonwealth, in order to discharge his duty and avoid taxation, if it is within three years of his appointment, for the amount last assessed to him.

If an executor, who has nearly distributed the estate in his hands, is assessed on the first of May for the amount assessed to him in the preceding year, and is allowed by the assessors until June 15 to bring in a list of the property in his hands, and does not give to them the notice and information required by the Pub. Sts. c. 11, § 20, cl. 7, in case of a distribution, until the November following, he cannot be said to have complied with the statute, and is liable for the amount so assessed to him.

MORTON, J. This is a petition for certiorari, for the purpose of correcting certain proceedings of the street commissioners of Boston, in refusing to abate a tax assessed by the assessors of Boston upon the petitioner, as executor of the will of Harriet Louisa Atkins, who died testate in Boston in November, 1886. The petitioner was appointed executor in December of the same year, and it appears that on the first day of May, 1887, he had the greater portion of said estate in his possession, of which $23,500 was taxable by the assessors of Boston. Pursuant to a notice to all the inhabitants of Boston to bring in lists of their estates liable to taxation, the petitioner handed to the assessors, before the fifteenth day of June, 1887, that being the time named by the assessors in their notice, a list of such property in his possession as executor, which amounted to $23,500, and was assessed by the assessors for that year on that amount of property. He was assessed for the same amount in 1888, though making no return. By December, 1888, he had distributed the greater part of the estate, and an account showing

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that he had done so was duly allowed by the judge of probate in January, 1889. On the 1st of May, 1889, he had only eight dollars of the estate in his possession. The assessors did not know of the allowance of the probate account before the tax for 1889 was assessed. In 1889, and previous thereto, the assessors sent notices to executors, administrators, and trustees whose addresses were known to them, to return to them a list of the property held by them and liable to taxation. Notices were also sent to all tax-payers to bring in lists of their estates liable to taxation, and executors, administrators, and trustees whose estates had been divided were required to give notice of such changes, and to state the names, residences, and amounts paid to the several parties residing in this State. The lists were required to be handed in on or before June 15, 1889. The petitioner prepared a list before June 15, but was prevented by illness in his family from presenting it till after that date. Soon after June 15, and before the tax was assessed, he called at the assessors' office, and was told that he could make the return later if he had a reasonable excuse. On November 21, 1889, after the tax was assessed, a list duly sworn to by the petitioner was filed by him with the assessors. The list was accompanied by full details of the names and residences of and the amounts received by the distributees, and showed that the amount of the property in the petitioner's hands on the 1st of May was eight dollars. In December the petitioner duly, and seasonably, applied for an abatement, which was refused. He thereupon appealed to the street commissioners, that being the proper body, and they also declined to make an abatement, although finding as a fact, what the assessors had previously admitted, that there was good cause shown why a list was not seasonably filed with the assessors.

The petitioner contends that he is entitled to an abatement, on the ground that good cause having been shown why the list called for by the assessors was not carried in at the time named, he is entitled to stand on the same footing as any other tax-payer not an executor, administrator, or trustee would stand under like circumstances. This involves an inquiry into the rights and duties of an executor respecting the assessment of taxes upon him concerning the personal estate in his hands as such executor.

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The first statutory provision respecting the subject is found in the Rev. Sts. c. 7, § 10, cl. 7, which provided that personal estate of deceased persons in the hands of their executors or administrators, and not distributed, should be assessed to the executor or administrator in the town where the deceased last dwelt, until the executor or administrator gave notice to the assessors that the estate had been distributed, and paid over to the parties interested therein. Prior to the passage of this statute, this court had decided that a tax could not legally be assessed to a person after his decease, but the assessment should be made upon his estate in the hands of his heirs, administrator, or whoever else might be in possession of it. *Cook* v. *Leland*, 5 Pick. 236. The Commissioners on the Revised Statutes, in speaking of this provision, (Rev. Sts. c. 7, § 10, cl. 7,) for which they refer to *Cook* v. *Leland*, say: "This section is intended as a practical rule for assessors, who, whatever diligence and care they may exercise, often find that they have assessed property to executors or administrators, after it has gone from their hands and been distributed among the heirs and legatees. It is respectfully suggested, that some provision is necessary on this subject, to point out the respective duties of the assessors and the representatives of deceased persons." It is evident that the statute thus passed provided for two things: the place where and the person to whom the personal estate of a deceased person should be assessed. The law remained thus till 1852, when it was further provided that the estate in the hands of an executor or administrator should be liable for taxes assessed upon the personal estate of a deceased person before the appointment of such executor or administrator. St. 1852, c. 234. This statute dealt mainly with the question who should be liable for such taxes. Next came the Gen. Sts. c. 11, § 12, cl. 7, which was made up of the Revised Statutes and of the St. of 1852, except that the words, "which shall be in the hands of their executors or administrators and not distributed," which were in the Revised Statutes, were omitted from the General Statutes. The law remained as above till the passage of the St. of 1878, c. 189, of which § 2 provided that the personal property held by an executor or administrator should be taxable to him for three years after his appointment, unless the same had been distrib-

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uted, and notice thereof, stating the names and residences of and the amounts paid to the several parties interested and resident in this State, had been given to the assessors. This statute further provided, in § 3, that, after personal property had been assessed to an executor, administrator, or trustee, an amount not less than that for which he was last assessed should be deemed to be the amount for which he was assessable, unless a true list was brought in by him under the Gen. Sts. c. 11, § 22. This act, it will be observed, dealt with the person to whom, and not with the place where, the personal estate of a deceased person should be assessed. No further legislation occurred in reference to the matter until the passage of the Pub. Sts. c. 11, § 20, cl. 7. This did not change the existing legislation, but embodied the provisions of the General Statutes, and of the St. of 1878, c. 189, § 2, placing them in a logical order, and somewhat compressing them. The provisions of the St. of 1878, c. 189, § 3, were embodied in § 44 of the Pub. Sts. c. 11.

It is obvious from this review of the legislation on the subject, that at least one object of it was to make it compulsory, so far as it could reasonably be done, on the part of executors and administrators, to give to the assessors, in case of a distribution of the estate in their hands, information of the names and residences of and the amounts paid to the parties interested who were resident within this Commonwealth, with a view, no doubt, to the assessors being informed to whom the property was taxable, and of assessing it accordingly. Executors and administrators are not only required to return a list of the property which they have in their hands liable to taxation, as every tax-payer is under the Pub. Sts. c. 11, § 38, but they are also required when they distribute the estate in their hands, in whole or in part, to inform the assessors thereof, and to state to them the amounts paid to and the names and residences of the distributees, so far as they are within this State. Nothing like this is required of the individual tax-payer. If he disposes of property for which he has been taxed, he is not required to state to whom he has transferred it. He is only required to bring in a list of his estate liable to taxation; if he fails to do this, there is no limit to the amount to which the assessors may doom him. In the case of an executor, administrator, or trustee, however, an amount

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not less than that last assessed shall be deemed to be the sum assessable unless a true list is brought in to the assessors as required by § 38. That is, unless he brings in a list the executor, administrator, or trustee is to be assessed for the amount for which he was last assessed. This is upon the ground that the amount for which he is taxable, having once been ascertained, the only change which can be reasonably expected to take place in the condition of the estate is one of decrease rather than increase, and it would be obviously unjust to give to the assessors an unlimited power to add to the amount of the estate to be assessed.

There is no conflict between the provisions of the Pub. Sts. c. 11, § 20, cl. 7, and those of the Pub. Sts. c. 11, §§ 38, 44, but they are all consistent with one another, and together prescribe clearly the duties of administrators and executors as to the taxation of the estates in their hands. Section 38 requires all persons to bring in to the assessors a list of their property liable to taxation. This includes all, whether in a representative or individual capacity, who hold property liable to taxation. But as various questions might arise concerning the estates of deceased persons, clause 7 of § 20 makes provision as to the place and manner in which, and the persons to whom, and for how long, the estates of deceased persons shall be taxable. There is nothing in this clause that relieves the administrator or executor from the requirement of § 38, to return a list of the property in his hands liable to taxation. Indeed, if the estate has been diminished by the payment of debts, or from any other cause except distribution, the only way in which he can avail himself of that fact is by returning a list under § 38, which will show the amount of the property remaining in his hands. If there has been a distribution partial or total, then he must, in addition to the list called for by § 38, give notice to the assessors, under clause 7 of § 20, of such distribution, stating the names and residences of and the amounts paid to the several parties interested, who are residents of this Commonwealth. If he fails to make the return called for by § 38, then the provisions of § 44 come into play, and an amount not less than that last assessed to him shall be deemed to be the sum for which he is assessable. In other words, the executor or administrator must not only make

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the return called for under § 38, but, in case there has been a distribution within three years, must give the notice concerning the same called for by clause 7 of § 20, in order to discharge his duty.

In the present case, the estate was in effect all distributed before May 1, 1889, but the petitioner gave no notice as required by clause 7, either before that date or before June 15 following, which was the last day fixed by the assessors for bringing in lists, nor did he carry in a list of the property in his hands as executor liable to taxation. The petitioner, however, insists that, the commissioners having found there was good cause for not bringing in a list prior to June 15, and such appearing to be the fact, and there being on May 1, 1889, only eight dollars of the estate in his hands for which he was taxable, out of the $23,500 for which he had been assessed the year before, he is entitled to an abatement. But the difficulty with the petitioner's position is, that, assuming that he would be entitled to an abatement if there had been no distribution, he has not given the notice which is required when there has been distribution, which is this case. *Hardy* v. *Yarmouth*, 6 Allen, 277. *Carleton* v. *Ashburnham*, 102 Mass. 348. The direction of the statute, as the court observes in *Hardy* v. *Yarmouth*, is that the estate shall be taxed to the executor until he gives the required notice, and it is not for this court to disregard this provision. No time is fixed within which the notice and information called for by clause 7 of § 20, in case of a distribution, shall be furnished, nor is there any remedy provided if it should turn out that there had been good cause for the delay in giving the notice and furnishing the information, nor any method for investigating the question whether there was or was not good cause for the delay. Probably, as a practical rule, it would work no harm to allow such notice and information to be given at any time on or before the date fixed by the assessors for bringing in lists under § 38. The actual assessment of taxes does not usually begin till after that, and no injury could result if the notice and information were delayed till then. Such seems to have been the rule adopted by the assessors of Boston, and we presume elsewhere. In the present case, however, the notice was not given till long after that date, and, whatever might have been the result had

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the notice been given on or before June 15, we do not see how it can be held that giving it in November was a compliance with the statute. The matter of abatement, like the matter of assessment, is one of purely statutory regulation. It is plain that the list referred to in the statutes concerning abatement is not the notice and information called for by clause 7 of § 20, but the list spoken of in § 38, and that it is only that list which can be received as preliminary to an abatement, upon good cause being shown for delay in bringing it in. Pub. Sts. c. 11, §§ 38, 39, 40, 41, 42, 72, 73. Even if, therefore, there were good cause shown for the delay in bringing in the list required by § 38, the assessors would still be required to assess to the petitioner an amount not less than that last assessed to him, because he had not given the notice and information required by clause 7 of § 20. If the construction thus given to the statutes leaves parties situated like the petitioner without a remedy, it is for the Legislature and not this court to provide one. We think, therefore, the entry must be,

Petition dismissed.

W. W. Vaughan, pro se.
A. J. Bailey, for the respondent.

HATHERLY A. STODDARD *vs.* INHABITANTS OF WINCHESTER.

Middlesex. January 14, 1891. — June 26, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, LATHROP, & BARKER, JJ.

Defect in Highway — Implied Notice.

The fact that a way is so constructed that it is not likely to keep in good condition for a great length of time will not impose liability on the town which is bound to keep it in repair, unless the danger is so imminent that it can fairly be said to show a want of reasonable care and diligence to omit guarding against it at once.

In an action to recover for personal injuries occasioned by an alleged defect in a highway which the defendant town was bound to keep in repair, it appeared in evidence that the defect consisted in a softening of the earth in the road, under

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the influence of a heavy storm, due to the digging of a trench for a water-pipe about six months before the accident, and that the road had been used meanwhile without the earth softening or any danger or defect existing until within an hour of the accident; and there was no claim that the town had notice, or might by the exercise of reasonable care and diligence have had notice, of the actual softening of the earth. *Held*, that the plaintiff was not entitled to go to the jury.

TORT, to recover damages for injuries sustained through a defect in Lincoln Street, a highway which the defendant town was bound to keep in repair. Trial in the Superior Court, before *Thompson*, J., who allowed a bill of exceptions in substance as follows.

There was evidence tending to prove the following facts. About six months prior to the accident, the employees of the water board of the town had dug a trench through Lincoln Street, laid a water-pipe therein, and replaced the earth. The street had been used thereafter up to the time of the accident. There was no evidence that the earth in the trench had softened, or that any danger or defect existed, until within an hour of the plaintiff's accident, nor was there any claim that the town had notice, or might by the exercise of reasonable care and diligence have had notice, of the actual softening of the earth in the trench.

The defendant asked the judge to rule that unless the town had reasonable notice, or might have had notice by the exercise of proper care and diligence, that the earth in the trench had actually become softened by the rains or other causes so that the street was dangerous, the plaintiff could not recover; and that if there were no outward signs that the earth in the trench had become softened, and if a careful observer would not have discovered the defective condition until two hours before this accident, the plaintiff could not maintain this action. The judge declined so to rule, and instructed the jury that "if the town was guilty of negligence in the filling of the trench, and so negligently filled it that ordinary rains and ordinary natural causes would make the earth in the trench so soft as to make the street unsafe and dangerous for persons travelling thereon in the exercise of ordinary care, and the town knew of this condition of the street, or in the exercise of reasonable care ought to have known of this condition of the street, of its liability so to become soft and unsafe and dangerous for travellers, and in

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the exercise of reasonable care could have remedied that condition of the street, or prevented the injury, then the town may be liable, if all the other conditions exist necessary to fix its liability."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The case was argued at the bar, in January, 1891, and afterwards in June following was submitted on the briefs to all the judges.

S. J. Elder, for the defendant.

J. T. Wilson, for the plaintiff.

ALLEN, J. The softening of the earth in the road, under the influence of a heavy storm, appears to have been due to the digging of a trench for a water-pipe about six months previously to the time of the accident. The street had been used meanwhile, and there was no evidence that the earth had softened, or that any danger or defect existed, until within an hour of the plaintiff's accident; and there was no claim that the town had notice, or might by the exercise of reasonable care and diligence have had notice, of the actual softening of the earth.

Under these circumstances, we think the case should have been withdrawn from the jury. In order to hold a town responsible on the ground of implied notice of a defect in the road, there should be such a condition of things as fairly to indicate that there may at any time be danger in using the road. It is not necessary that roads should be built according to the highest standards of engineering; and the practical rule that must be adopted in order to impose liability in such cases is, that the condition of the road must be such that danger may reasonably be apprehended at any time, and therefore ought to be guarded against. See *Rochefort* v. *Attleborough*, *ante*, 140. The fact that a road is so constructed that it is not likely to keep in good condition for a great length of time, will not impose liability on the town which is bound to keep it in repair, unless the danger is so imminent that it can fairly be said to show a want of reasonable care and diligence to omit guarding against it at once. Such was not the present case. In the opinion of a majority of the court, the entry must be,

Exceptions sustained.

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SARAH MACDONALD *vs.* THOMAS DANA.

Suffolk. January 14, 1891. — June 26, 1891.

Present: ALLEN, HOLMES, MORTON, LATHROP, & BARKER, JJ.

Written Receipt — Extrinsic Evidence.

A receipt in the following form, "Received of D. W., Treas., five hundred dolls., being amount received from lectures given by Rev. H. B. C. in Hollis Street Church for memorial window to be put into said church as per agreement," is not conclusive evidence of full payment and satisfaction, but is ambiguous, and parol evidence is admissible to show what the agreement referred to was.

CONTRACT, to recover a balance alleged to be due for a stained glass window put into the Hollis Street Church in Boston. Answer, a general denial and payment.

At the trial in the Superior Court, before *Dunbar*, J., there was evidence that the plaintiff, who was the wife of Donald Macdonald, had been engaged in business since 1879 under his name with the addition of "Agent," and that her husband assisted her in the business, and had authority through her to sign receipts and receive money. The plaintiff introduced evidence, which was contradicted, that in 1884 the defendant employed the plaintiff, through her husband, to make the window in question, and agreed to pay therefor not less than $1,600; that in January, 1886, upon the completion of the window, the plaintiff's husband went to the defendant for a payment on account, and was by the defendant sent to one Wheeler, from whom he received the sum of $500, and, without reading it or knowing its contents, signed a receipt written by Wheeler. The defendant contended, and introduced evidence tending to show, that the plaintiff had admitted that the proceeds of the course of lectures delivered by the Rev. H. B. Carpenter in the winter of 1884–85 were to be received by her in full payment for the window. The defendant also put in evidence the following receipt, being that signed by the plaintiff's husband: "Boston, January 21, 1886. Received of Daniel Wheeler, Treas., five hundred dolls., being amount received from lectures given by Rev. H. B. Carpenter in Hollis Street Church for memorial window to be

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put into said church as per agreement. Donald Macdonald." The judge refused to rule, as requested by the defendant, that the receipt was conclusive evidence of full payment and satisfaction, and admitted evidence offered by the plaintiff tending to show that the $500 paid by Wheeler was not received, or agreed to be received, by the plaintiff in full payment for the window.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The case was argued at the bar in January, 1891, and afterwards, in June following, was submitted to all the judges except *Field*, C. J., and *Knowlton*, J.

B. E. Bates, to the point that the receipt was a contract as well as a receipt, and that parol evidence was inadmissible to contradict it, cited *Langdon* v. *Langdon*, 4 Gray, 186; *Brown* v. *Cambridge*, 3 Allen, 474; *James* v. *Bligh*, 11 Allen, 4; *Hurley* v. *Brown*, 98 Mass. 545; *Goss* v. *Ellison*, 136 Mass. 503; *Squires* v. *Amherst*, 145 Mass. 192.

M. Holbrook, (*L. W. Howes* with him,) for the plaintiff.

MORTON, J. The only exception in this case is that taken by the defendant to the refusal of the court to rule, as requested by him, that the receipt was conclusive evidence of full payment and satisfaction. This presents the question whether the receipt is to be regarded as a contract on the plaintiff's part, in which she agrees to receive in satisfaction and discharge of her claim the amount named, in which case parol evidence would not be admissible to vary or control it, or whether it could be properly treated as an acknowledgment merely on the part of the plaintiff that she had received the sum named in it towards the amount due her on account of her claim; and we think it is very clear that it could be so treated, and that the refusal of the court to give the instruction requested by the defendant was correct. The receipt does not purport on its face to be a satisfaction or discharge of the plaintiff's claim, or an agreement that the amount named in it was received in full, or that she would take the proceeds of Mr. Carpenter's lectures in payment of the window. The case therefore differs from those cited and relied on by the defendant, in which some one of these elements appeared. The receipt simply acknowledges the payment by

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Mr. Wheeler, as treasurer, of five hundred dollars, "being amount received from lectures given by Rev. H. B. Carpenter in Hollis Street Church for memorial window to be put into said church as per agreement." It is plain that there is nothing here to show that the sum named was paid or received in full for, or in payment or satisfaction of, the plaintiff's claim. There are no words of such import. It was open to the defendant to show, if he could, that such was the fact; but this he has failed to do.

The receipt is, moreover, ambiguous. It is possible to construe it so that the part which follows the words "five hundred dollars" may have been used to indicate the source from which the money came, and nothing more, being used by Mr. Wheeler for his own protection; and this would not perhaps be an unreasonable construction. At any rate, an element of uncertainty is introduced into it by the words "per agreement," at the close. It is doubtful whether they refer to the amount named earlier in the receipt, or to the whole body of the receipt preceding them, as claimed by the defendant, or to the words "memorial window to be put in said church," immediately before them. And there is nothing to show what the agreement was. It was therefore open to the parties to introduce parol evidence of it, so that, if the receipt were to be held as a contract of the nature claimed by the defendant, the court was right in refusing the defendant's request. *Bard* v. *Wood*, 3 Met. 74. *Hildreth* v. *O'Brien*, 10 Allen, 104. *Stacy* v. *Kemp*, 97 Mass. 166. *Stoops* v. *Smith*, 100 Mass. 63. *Lee* v. *Lancashire & Yorkshire Railway*, L. R. 6 Ch. 527.

The view which we have taken of the main question at issue renders it unnecessary to consider the other points which have been made.

Exceptions overruled.

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EDWARD D. CONKLIN *vs.* OLD COLONY RAILROAD COMPANY.

Suffolk. January 19, 20, 1891. — June 26, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, & MORTON, JJ.

Eminent Domain — Easement — Railroad — Trespass.

The city of Boston took a strip of land for the improvement of Stony Brook, under the St. of 1874, c. 196, § 1, which contained a provision that "the title to all land so taken shall vest in said city," and subsequently another strip, under the St. of 1887, c. 428, which contained no such provision. The first taking reserved to the owners "the right to erect and maintain buildings over and upon said brook, and to use the waters of said brook so far as said acts may not obstruct the free flow of said waters, it being the intention of this taking to acquire merely the right to improve the channel of said brook"; the second taking was for the specified purpose of making a new channel, covered or uncovered, for the brook. *Held*, that the city acquired an easement only in the land taken.

In an action against a railroad company to recover for injury to the plaintiff's horses, it appeared in evidence that the horses escaped from his stable, and, passing over intermediate land, went upon the defendant's unfenced location, and were run over by a train; that the city, for the purpose of improving a brook, had taken an easement in such intermediate land, which belonged to the plaintiff, and had entered thereon and had cut in two a shed standing beside the railroad location, and, moving a part of it, had left an open space between that and the rest of the structure; that it then proceeded to occupy the land and make the structures and excavations necessary for its work, and had continued in such actual occupation up to the time of the accident; and that the horses in escaping from the stable went through the space thus left open. The presiding judge declined to rule that the defendant was not liable, holding that the horses were not trespassing when they came upon the strip taken, and submitted the case to the jury. *Held*, that the defendant had no ground of exception.

TORT, for injuries received by the plaintiff's horses while upon the defendant's railroad. Trial in the Superior Court, before *Pitman*, J., who, after a verdict for the plaintiff, reported the case for the determination of this court. The facts appear in the opinion.

J. H. Benton, Jr., for the defendant.

C. W. Bartlett & E. R. Anderson, for the plaintiff.

ALLEN, J. The plaintiff's horses escaped from his stable, and passed over two strips of land, which formed part of a lot hired by the plaintiff and had been taken by the city of Boston

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for the purpose of making a new channel for Stony Brook, and went upon the defendant's railroad track, where they were run over by a train. There was no fence between the track and the lands taken by the city. The question is whether the city took a fee in either of the two strips of land, or only an easement. If it took a fee, the horses were trespassing and as trespassers went upon the railroad track, and the plaintiff cannot recover. If the city did not take a fee, or such title as to make the horses trespassers, then the plaintiff can recover, since the defendant owed to him the duty of building a fence. Pub. Sts. c. 112, § 115.

The city took land twice. The first taking was under the St. of 1874, c. 196, § 1, which contained a provision that "the title to all lands so taken shall vest in said city." Under this statute the city had a right to take a fee, but it did not do so. It took a strip of land, reserving to the owners "the right to erect and maintain buildings over and upon said brook, and to use the waters of said brook so far as said acts may not obstruct the free flow of said waters, it being the intention of this taking to acquire merely the right to improve the channel of said brook." This was not such a taking as that referred to in *Page* v. *O'Toole*, 144 Mass. 303, where under a similar statute there was a taking in which no rights were reserved to the owner, and where accordingly it was held that the city took a fee. In the present case only an easement was taken.

The second taking was under the St. of 1887, c. 428, which contained no provision that the title to lands taken should vest in the city. The city, therefore, took only such estate as is necessary to carry out the purposes for which it was permitted to take the lands. *Attorney General* v. *Jamaica Pond Aqueduct*, 133 Mass. 361, 365. *Clark* v. *Worcester*, 125 Mass. 226, 231. The original owner might make all such use of the land as was consistent with the easement taken. The authorized purpose of the taking was to make a new channel, covered or uncovered, for the brook. St. 1887, c. 428. This purpose was specified in the certificate of taking, filed in the registry of deeds.

The defendant now contends that it should have been submitted to the jury, to determine whether the plaintiff's use of the land was consistent with the city's occupation of it. At the

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trial, the defendant asked a broader ruling, namely, that it was not liable. The only statement in the report of the case as to the actual use or occupation by the city is, that "the city then proceeded to occupy the land, and make structures and excavations necessary for their work, and continued in such actual occupation up to the time of the accident." It had already entered upon the land, cut in two a shed standing along the line of the railroad location, and moved a part of it further up on the lot, leaving a space of about eighteen feet between the corner of the part thus moved up and the corner of that portion of the shed that was not moved. The horses went through the space thus left open. Upon this evidence the court declined to rule that the defendant was not liable, and held that the horses were not trespassing upon the land of another when they came upon the railroad.

The plaintiff had a right to make all the use of his land that did not interfere with the city's use. There was nothing to show that the plaintiff might not make some use of the land at the time of the injury to his horses. The city raised no objection. If the defendant would raise the objection that, as between the plaintiff and the city, the plaintiff was exceeding his rights in making any use of that part of his land in which the city had taken an easement, it ought to make it so appear. *Prima facie*, the plaintiff was not exceeding his rights, and his horses were not trespassing. *Judgment on the verdict.*

HERBERT RADCLYFFE *vs.* GEORGE S. BARTON.

Suffolk. January 20, 1891. — June 26, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Superior Court — Vacation of Judgment — Writ of Error.

The Superior Court has no power on a mere motion, after the term at which judgment is rendered upon a default without fraud, error, or mistake, and after the lapse of several more terms, to vacate the judgment, bring forward the action, amend the writ by increasing the *ad damnum*, and enter judgment against the defendant for a larger sum, whether notice is given to him of the motion or not.

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WRIT OF ERROR, issued on January 6, 1889, to reverse a judgment rendered by the Superior Court at July term, 1879. Plea, *in nullo est erratum.*

The record of the action in which the judgment was rendered, transmitted by the Superior Court, showed that on June 11, 1878, an action of contract upon a promissory note for one thousand dollars, made by the plaintiff in error to the order of the defendant in error, was brought by the latter against the former, the *ad damnum* of the writ being laid at three hundred dollars; and that at the July term, 1878, judgment was rendered against the plaintiff in error on his default, and in favor of the defendant in error, in the sum of three hundred dollars, together with the costs of suit. At the July term, 1879, the defendant in error filed a motion in that court to vacate the judgment so rendered by default, bring the suit forward, and increase the *ad damnum* in the writ to fifteen hundred dollars. This motion was allowed on the day it was filed, and at the same time judgment was rendered in the case in favor of the defendant in error for $1,116.73 damages, together with the costs of suit, on which execution was duly issued.

The assignment of errors recited, among other things, that the judgment was vacated, the action brought forward, and the *ad damnum* increased, and the new judgment rendered, without notice to the plaintiff in error of the motion filed by the defendant in error.

The case was submitted to this court on agreed facts, reciting that the transcript of the records of the Superior Court was correct, and that an action of contract had been brought upon the judgment sought to be reversed within six years prior to suing out this writ of error, and waiving any assignment of error requiring other evidence.

C. H. Sprague, for the plaintiff in error.

H. Lougee, for the defendant in error.

ALLEN, J. The cause was finally disposed of by the entry of judgment for three hundred dollars on the default. There was no fraud nor error nor mistake in the entry of that judgment, as was the case in *Edson* v. *Edson*, 108 Mass. 590. *Stickney* v. *Davis*, 17 Pick. 169. *Capen* v. *Stoughton*, 16 Gray, 364. The term of court had closed. Several more terms had also passed.

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After all this, the court on a mere motion assumed to vacate the judgment, to bring forward the action, to allow an amendment increasing the *ad damnum*, and to enter judgment against the plaintiff in error for a larger sum. We need not consider whether it is to be presumed that notice of the motion was given to the plaintiff in error or not. In the assignment of errors he sets forth that no notice was given to him; but by his agreement he waives this. It would be more satisfactory to have had this fact proved, if it existed; but whether notice was given or not, it was not in the power of the court at that time to vacate the judgment on a mere motion. *Mason* v. *Pearson*, 118 Mass. 61. *Blanchard* v. *Ferdinand*, 132 Mass. 389. *Wood* v. *Payea*, 138 Mass. 61. *Pierce* v. *Lamper*, 141 Mass. 20. *Barnes* v. *Smith*, 104 Mass. 363. *Mortland* v. *Little*, 137 Mass. 339. See also *Dudley* v. *Keith*, 153 Mass. 104. We need not consider whether it might have been done on a formal petition, under the Pub. Sts. c. 187, § 17, (*Pierce* v. *Lamper*, *ubi supra*,) or on a writ of review. Pub. Sts. c. 187, §§ 22, 25, 30, 35.

The judgment for three hundred dollars was properly entered, and the plaintiff in error has no ground of complaint on that score. *Jarvis* v. *Blanchard*, 6 Mass. 4. *Storer* v. *White*, 7 Mass. 448. *Fairfield* v. *Burt*, 11 Pick. 244. That judgment therefore will stand, and the judgment subsequently entered must be reversed. *Judgment reversed.*

BENJAMIN H. DYER *vs.* ELLEN A. SWIFT.

Barnstable. January 21, 1891. — June 26, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Married Woman — Agency of Husband.

In an action against a married woman to recover for painting her house upon her husband's order, there was evidence that they lived in the house and together selected the colors of the paint, that subsequently the colors were changed by her direction, and that the work was originally charged to him. There was also evidence that the plaintiff, after being told that the house belonged to her, made out his bill against the husband. Both the husband and wife testified that the former was not the latter's agent in giving such order, he stating fur-

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ther that he expected to pay for the painting as a gratuity from his own money, and she that this was what she expected, having no money with which to pay for the work. *Held*, that a finding was warranted that, in making the contract, the husband acted as the wife's agent; and that the plaintiff could recover.

CONTRACT for labor performed and materials furnished by the plaintiff in painting the defendant's house.

At the trial in the Superior Court, without a jury, before *Pitman*, J., it was agreed that the report of an auditor, to whom the case was referred, should be treated as an agreed statement of facts. This report recited that the labor and materials in question were contracted for by the defendant's husband, and originally were charged to him by the plaintiff; that the house, in which the defendant and her husband lived together, belonged to the defendant, together with the land under it, the house having been built by the husband out of his own funds; that the house had been painted twice previously, and the husband had paid therefor on both occasions; that, shortly before the house was painted by the plaintiff, the husband said to him that he was going to have his house painted, and asked the plaintiff to give him samples of colors to show his wife; that the plaintiff did so, and the defendant afterwards returned the samples, saying, "We have selected these," indicating certain colors among them; that the plaintiff thereupon proceeded to do the work; that the roof of the house was painted first, and before beginning the plaintiff asked the defendant's husband if the house was to be painted the same colors as before, and the husband replied that he would call his wife and see what she thought; that he went into the house, and soon after came out with the defendant, and she told the plaintiff that she wanted the colors changed, and specified how she wanted them changed; that the plaintiff charged the work upon his books to the defendant's husband, and gave credit therefor to the husband, believing him to be the owner of the house; and that shortly before the work was done he was told by the defendant's husband that the house belonged to the defendant, subsequently to which the plaintiff presented a bill to the defendant's husband made out against him for the work.

The defendant's husband testified that, when he made the contract with the plaintiff for painting the house, he made it not as

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agent for his wife, but expecting to pay for the painting from his own money, as he had done before, and as a gratuity to his wife, so far as she was benefited. The defendant testified that she never expected to pay for the painting, and that she had no money to do so with, and did not authorize her husband to make the contract as her agent, but expected that he would pay for the painting as he had done before.

The report also contained the following statement by the auditor: "If, upon the foregoing facts, which are all the facts found by me relating to the transaction, a tribunal of fact is authorized to find that the husband acted as the agent of the defendant, and that, notwithstanding he gave credit to the husband, he has a right to look to the defendant for payment of the bill, then I do find that in employing the plaintiff the husband acted as the agent of the defendant, and she is liable to the plaintiff in this suit."

The parties agreed that if, upon the statement of agreed facts, the court was of opinion that "the auditor ought not, as a matter of law, to have found for the plaintiff, judgment to be entered for the defendant; otherwise, for the plaintiff."

The judge ordered judgment for the plaintiff for the amount found by the auditor; and the defendant appealed to this court.

The case was submitted on briefs, in January, 1891, and afterwards was re-submitted, on the same briefs, to all the judges except *Barker*, J.

J. H. Hopkins, for the plaintiff.

H. P. Harriman, for the defendant.

MORTON, J. By agreement between the parties, the auditor's report was treated as a statement of agreed facts; and it was further agreed, that if, upon such statement, "the auditor ought not, as a matter of law, to have found for the plaintiff, judgment to be entered for the defendant; otherwise, for the plaintiff." The case was tried by the court below, without a jury, and judgment ordered for the plaintiff, from which the defendant appealed. The question is whether, as matter of law, upon the facts found by him, the finding of the auditor in favor of the plaintiff was wrong, and we are of opinion that it was not.

It is true, as appears from the auditor's report, that both husband and wife testified that the husband was not the agent of

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the wife in making the contract with the plaintiff. The husband stated also, that he expected to pay for the painting from his own money, as he had done before, and as a gratuity to his wife, so far as she was benefited. The wife said that she expected her husband to pay for the painting, as he had done before, and that she had no money to pay for the painting, and never expected to do so. The auditor, however, was not bound to accept this testimony as conclusive. He had a right to reject it, if he did not deem it entitled to credit. On taking the appearance and situation of the husband and wife into account, he may have considered that their testimony in this respect was not of sufficient weight fairly to meet or control the inferences to be drawn from the other facts and circumstances in the case. Disposing thus of the testimony of the husband and wife, as he might, it is clear that, under previous decisions of this court, there was sufficient evidence to justify the finding of the auditor that in making the contract with the plaintiff the husband acted as agent of the defendant. *Westgate* v. *Munroe*, 100 Mass. 227. *Gardner* v. *Bean*, 124 Mass. 347. *Lovell* v. *Williams*, 125 Mass. 439. *Arnold* v. *Spurr*, 130 Mass. 347. *Wheaton* v. *Trimble*, 145 Mass. 345. *Jefferds* v. *Alvard*, 151 Mass. 94. The fact that, after the plaintiff had been told that the house belonged to the defendant, he made out his bill against the husband, while perhaps evidence of an intention to look to the husband alone, was not absolutely conclusive of such a purpose, and of an abandonment of any claim against the defendant. *Raymond* v. *Crown & Eagle Mills*, 2 Met. 319. *Gardner* v. *Bean*, 124 Mass. 347.

Judgment affirmed.

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IRA H. BICKFORD *vs.* GEORGE A. RICHARDS & another.

Middlesex. January 23, 1891. — June 26, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Privity of Contract — Negligence — Misfeasance.

If a contractor, who agrees to move and fit up a building in a workmanlike manner, makes a sub-contract with others to do the work, the latter are liable to the owner of the building for negligence and misfeasance in performing the same, although there is no privity of contract between them.

TORT, for negligently moving a building. Trial in the Superior Court, before *Thompson*, J., who allowed a bill of exceptions, in substance as follows.

It appeared in evidence that the plaintiff made a contract in writing with one Powers to move and fit up certain buildings in Somerville, by the terms of which Powers was to do the work in a workmanlike manner; that Powers contracted with the defendants, George A. Richards and Sylvester Richards, to move the buildings for an agreed sum, namely, one hundred dollars; and that before the defendants had completed the moving of the buildings Powers gave up his contract, but the defendants continued to carry out their contract to move the buildings.

The plaintiff offered to show that the moving of the buildings by the defendants was done in a careless and negligent manner, and that the buildings were damaged thereby. The judge excluded this evidence, and ruled that, if it was proved that the moving was done in an unworkmanlike, unskilful, and negligent manner, it would not entitle the plaintiff to recover against the defendants in this action, as there was no privity of contract between the plaintiff and the defendants, and ordered a verdict for the defendants; and the plaintiff alleged exceptions.

G. A. Perkins, for the plaintiff.

J. H. Cotton, for G. A. Richards.

H. W. B. Cotton, for S. Richards.

MORTON, J. It is immaterial whether the defendants are to be regarded as the servants and agents of the plaintiff, or as contractors under Powers, which the defendants contend was the

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case. In either instance, they owed to the plaintiff the duty of not injuring his property by their negligent or wrongful acts. If they were the plaintiff's servants, and their negligent actions caused injury to his building, they would be liable to him for the damage. Bac. Abr. Master & Servant (M). Smith, Master & Servant, (4th ed.) 134, and cases cited. *White* v. *Phillipston*, 10 Met. 108. *Walcott* v. *Swampscott*, 1 Allen, 101. If they were contractors in possession of the building under Powers, or were his servants, it was also their duty not to injure the plaintiff's property by their negligent acts. Whether servants or contractors, they were liable for the damage caused to the plaintiff's property by their tortious acts or misfeasance. *Hewett* v. *Swift*, 3 Allen, 420. *Wright* v. *Wilcox*, 19 Wend. 343.

The plaintiff's right of action does not depend on the existence of a contract between himself and the defendants, as would be the case if he were suing for damages resulting from some nonfeasance on their part, but on the fact that they have wrongfully and negligently done, or caused to be done, something to his property which has injured it. The gist of the action is the breach by the defendants of the duty which they owed to the plaintiff not to injure his property by any wrongful or negligent acts of theirs. That duty did not depend on or grow out of contract. *Bretherton* v. *Wood*, 3 Brod. & Bing. 54. *Smith* v. *Seward*, 8 Penn. St. 342. *Coggs* v. *Bernard*, 2 Ld. Raym. 909. It may be that Powers is liable to the plaintiff for a breach of the contract caused by the acts of the defendants, and that they may also be liable to Powers for a breach of their contract with him; but that does not relieve the defendants from liability to the plaintiff for the damage to his property resulting from their negligent and wrongful acts. *Stock* v. *Boston*, 149 Mass. 410, 414.

Nor does it follow, as contended by the defendants, that, because the plaintiff may not be liable for the acts of the defendants, as their master or otherwise, they are not liable to him. The two liabilities stand on different grounds. The case of *Davidson* v. *Nichols*, 11 Allen, 514, 516, relied on by the defendants, was put by the court on the ground that there was not only no contract between the plaintiff and the defendant, but that the latter owed the former no duty, and is therefore readily distinguishable from this. *Exceptions sustained.*

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EMMA DANIELS *vs.* FRANK S. HAMMOND & another.

Suffolk. March 5, 1891. — June 26, 1891.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Partnership — Partner's Private Debt.

A partner cannot bind the partnership for his private indebtedness by offering payment, and, upon his creditor's assenting to his further offer to borrow the amount for the partnership, giving him therefor merely a firm note, unless his copartner has knowledge of the transaction and assents thereto.

CONTRACT, against Frank S. Hammond and Edgar G. Scripture, for money lent by the plaintiff to the defendants as members of the firm of Hammond and Scripture. Scripture alone defended.

At the trial in the Superior Court, before *Thompson*, J., the evidence tended to show that on November 17, 1888, the plaintiff, through her husband as her agent, lent to the firm of Stewart, Hammond, and Mead, of which firm the defendant Hammond was a member, one thousand dollars of her own money, and received therefor a promissory note for that amount payable on demand to her order, signed by Hammond and indorsed by him before delivery to her in the name of the firm; that the defendant Scripture was not a member of this firm; that the firm of Stewart, Hammond, and Mead shortly after was dissolved, and the firm of Hammond and Scripture afterwards formed, on April 1, 1889; that about May 17, 1889, Hammond called upon the plaintiff's husband and told him that he was a partner with the defendant Scripture, and then said, "I want to settle up with you," at the same time telling him that he would like to retain the money for the benefit of the firm of Hammond and Scripture; that the plaintiff's husband then proceeded to inquire as to the financial standing of Scripture, and, finding it good, in a subsequent conversation with Hammond told him that the firm of Hammond and Scripture could have the money; that Hammond then drew a promissory note payable on demand to the order of the plaintiff for $1,240, which he signed with his own name and indorsed in the name of the firm of Hammond

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and Scripture, and delivered it to the plaintiff's husband for her. The evidence further tended to show that the defendant Scripture knew nothing of the loan, or of the giving of the note last referred to, until demand was made upon him in September, 1889.

At the conclusion of the evidence, the judge ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendant; and the plaintiff excepted. By agreement of parties, if the plaintiff was entitled to recover, the verdict was to be set aside and judgment entered for the plaintiff in the sum of one thousand dollars; otherwise, judgment was to be entered upon the verdict.

The jury returned a verdict for the defendant Scripture; and the plaintiff alleged exceptions.

W. I. Badger, for the plaintiff.

C. R. Elder, for Scripture.

MORTON, J. The question in this case is whether the circumstances were such that, as matter of law, the plaintiff had actual or constructive notice that the indorsement made by Hammond of the firm name upon the note was made without the assent and in fraud of the defendant Scripture, and we think they were. The plaintiff, or what is the same thing, her agent, knew that of the two defendants Hammond was alone liable on the note which she held bearing the indorsement of Stewart, Hammond, and Mead; or, in other words, that it was the debt of the defendant Hammond, and not the debt of the defendant Scripture or of the firm of Scripture and Hammond. The plaintiff's agent knew when he took the defendant's note, indorsed by the defendant with the firm name of Scripture and Hammond, that, if he was taking it as payment, he was taking it as payment of the indebtedness of Hammond. If, as he claims, he was taking it as evidence of a loan to Scripture and Hammond, he knew that the note which he was receiving was considerably in excess of the amount he was lending, and the bill of exceptions discloses no explanation whatever of that fact. On the contrary, the statement in it is, that, if the plaintiff is entitled to recover, she is to have judgment for one thousand dollars and interest, and not for the amount of the note and interest, showing that the whole amount of the note was not a loan to Scripture and

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Hammond. If it had been, the plaintiff would have asked for judgment for its face and interest, and been entitled to it, if entitled to anything. Again, there is nothing in the exceptions to show that the note which the plaintiff held bearing the indorsement of Stewart, Hammond, and Mead was surrendered at the time the note in suit was taken, or was paid in any other way than that it was considered cancelled when the alleged loan was made to the firm of Scripture and Hammond; and nothing to show that any part of the first note went to the benefit of Scripture and Hammond, although neither that fact, nor the fact that the note was the note of the defendant Hammond indorsed by him with the firm name, would of themselves perhaps be sufficient notice of fraud. *Wait* v. *Thayer*, 118 Mass. 473. *Atlas National Bank* v. *Savery*, 127 Mass. 75.

We do not think a partner can shift his private indebtedness from his own shoulders to those of his firm by offering to his creditor to pay his debt, and then asking him to lend the amount to the firm of which he is a member, and thereupon, on the creditor's assenting, giving him without anything more a firm note for the amount, unless it is shown that the transaction is in some way brought to the knowledge of and assented to by the other member or members of the firm. It certainly would open a wide door to fraud to admit such a doctrine. *Chazournes* v. *Edwards*, 3 Pick. 5. *Sweetser* v. *French*, 2 Cush. 309. *Fall River Union Bank* v. *Sturtevant*, 12 Cush. 372. *Locke* v. *Lewis*, 124 Mass. 1. *National Bank of the Commonwealth* v. *Law*, 127 Mass. 72, 75. *Shirreff* v. *Wilks*, 1 East, 48. 1 Lindl. Part. (2d Am. ed.) 171.

The evidence showed that the defendant Scripture did not know of the giving of the note till demand was made upon him in September, 1889, several months after the giving of the note. We think, therefore, the entry must be,

Judgment on the verdict.

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ROSE SHINNERS *vs.* PROPRIETORS OF LOCKS AND CANALS ON MERRIMACK RIVER.

Middlesex. March 6, 1891. — June 26, 1891.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Exceptions — Negligence — Employers' Liability Act — Evidence of subsequent Acts.

An exception to the exclusion of a question cannot be maintained, when there is nothing in the bill of exceptions to show what the testimony of the witness would have been, if admitted, or what the party putting the question offered to prove thereby.

If an accident happens through the alleged negligence of an employer, his subsequent acts in taking additional precautions to prevent other accidents are not admissible in evidence, in an action against him for the injuries occasioned, either at common law or under the employers' liability act (St. 1887, c. 270, § 2), for the purpose of showing that such precautions were needed at the time of the accident.

If evidence is properly excluded when offered by a plaintiff, but becomes competent in consequence of evidence offered by the defendant, the former, to avail himself of it, should offer it again in rebuttal.

TORT, by the widow of Matthew Shinners, for causing his death. Trial in the Superior Court, before *Sherman*, J., who allowed exceptions, which appear in the opinion.

C. Cowley, for the plaintiff.

G. F. Richardson, for the defendant.

LATHROP, J. This is an action, under the St. of 1887, c. 270, § 2, brought by the widow of Matthew Shinners, to recover damages sustained by her in consequence of the death of her husband, caused by the falling upon him of a portion of a bank of earth, while he was working as a day laborer in the employ of the defendant corporation, and engaged in digging a trench in Lowell. He died without conscious suffering. The bank was eighteen feet high, and was composed of hard gravel, clay, and marl. The plaintiff contended that the fall of the bank took place in consequence of the unreasonable neglect of the defendant to have the bank properly shored up.

At the trial in the Superior Court, the jury returned a verdict for the defendant; and the case comes before us on the plaintiff's

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exception to the exclusion of the following question, put by the plaintiff to one of her witnesses, who worked in the trench before, after, and at the time of the accident: "What, if anything, was done by the defendant to said bank after the accident?"

There is nothing in the bill of exceptions to show what the testimony of the witness would have been, if admitted, or what the plaintiff offered to prove thereby, and for this reason an exception to the exclusion of the question cannot be maintained. *Hathaway* v. *Tinkham*, 148 Mass. 85, 87, and cases cited. *Crowley* v. *Appleton*, 148 Mass. 98, 101. *Smethurst* v. *Barton Square Church*, 148 Mass. 261, 267. *Farnum* v. *Pitcher*, 151 Mass. 470, 475. As, however, the point of law sought to be presented by the exception is an important one, arising constantly in trials at *nisi prius*, and as it has been elaborately argued by counsel, we are disposed to rest our judgment upon a broader ground than the one above stated.

The plaintiff contends that, when an accident has happened through the alleged negligence of a person, the subsequent acts of this person in taking additional precautions to prevent other accidents are admissible in evidence, in an action against him for the injuries occasioned, for the purpose of showing that such precautions were needed at the time of the accident. If such acts are admissible, it must be on the ground that the conduct of the person amounts to an admission of negligence; and this is the ground upon which such evidence has been sometimes held to be admissible. *Pennsylvania Railroad* v. *Henderson*, 51 Penn. St. 315. *West Chester & Philadelphia Railroad* v. *McElwee*, 67 Penn. St. 311. *McKee* v. *Bidwell*, 74 Penn. St. 218. And in *Dale* v. *Delaware, Lackawanna, & Western Railroad*, 73 N. Y. 468, it is said by Judge Rapallo, speaking of repairs made by a railroad corporation immediately after an accident, "In such a case the making of the repairs may be regarded as some evidence that they were needed, and consequently that the road was out of repair." This remark was however *obiter*, and although in accord with some decisions of the Supreme Court of the State of New York, which we need not farther refer to, is contrary to what is now the well established doctrine of the Court of Appeals of that State, as will presently appear.

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The Pennsylvania doctrine was at first followed by the Supreme Court of Minnesota. *O'Leary* v. *Mankato*, 21 Minn. 65. *Phelps* v. *Mankato*, 23 Minn. 276. *Kelly* v. *Southern Minnesota Railway*, 28 Minn. 98. But these cases were deliberately overruled in *Morse* v. *Minnesota & St. Louis Railway*, 30 Minn. 465, in an elaborate opinion, in which the question is fully and carefully considered.

Such evidence has also been held to be inadmissible by the highest tribunals in New York, Connecticut, Indiana, Illinois, and Iowa. *Dougan* v. *Champlain Transportation Co.* 56 N. Y. 1. *Baird* v. *Daly*, 68 N. Y. 547. *Corcoran* v. *Peekskill*, 108 N. Y. 151. *Nalley* v. *Hartford Carpet Co.* 51 Conn. 524. *Terre Haute & Indianapolis Railroad* v. *Clem*, 123 Ind. 15. *Hodges* v. *Percival*, 132 Ill. 53. *Cramer* v. *Burlington*, 45 Iowa, 627. *Hudson* v. *Chicago & Northwestern Railway*, 59 Iowa, 581. See also *Hart* v. *Lancashire & Yorkshire Railway*, 21 L. T. (N. S.) 261.

In a recent case in this Commonwealth, (*Menard* v. *Boston & Maine Railroad*, 150 Mass. 386,) the plaintiff was struck by a locomotive engine of the defendant at a highway crossing. At the time of the accident no flagman was stationed there; but the jury, when they took a view, found one there. The plaintiff's counsel in argument proposed to comment upon this fact, and was stopped by the court. On exceptions, this action of the court was held to be correct; and Mr. Justice Knowlton, in delivering the opinion of the court, said: "The defendant's method of managing its business before, or after, or at the time of the accident, was not evidence of what due care required. The defendant, or any other corporation, might at any time do more or less, in some particular, than a reasonable regard for the safety of the public demanded. Its adoption of a particular safeguard at any time, whether an accident had previously occurred or not, could not be deemed an admission that taking any less precaution would be negligence, any more than its use of a more dangerous system would indicate that it considered that reasonably safe."

The plaintiff relies upon the case of *Readman* v. *Conway*, 126 Mass. 374, where the fact that the defendants repaired a platform after an injury occasioned to the plaintiff by a defect therein, was held to be admissible as an admission "that it was their duty

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to keep the platform in repair." This case is readily distinguishable from the case at bar. The defendants were the owners of a building containing a number of shops, each let orally to a separate tenant. The building stood back from a street, and had a wooden platform in front of it, which extended to the sidewalk of the street. The question was whether the landlords or the tenants were bound to keep the platform in repair. The act of the defendants in making the repairs was an act of dominion exercised by them, which the jury might well find was inconsistent with their defence that the tenants were under an obligation to keep the platform in repair. For the same reason, the fact that a city makes repairs upon a highway after an accident thereon has been held to be admissible to show an acceptance of the highway as dedicated. *Manderschid* v. *Dubuque*, 29 Iowa, 73. See also *Sewell* v. *Cohoes*, 75 N. Y. 45, 54; *Lafayette* v. *Weaver*, 92 Ind. 477.

The plaintiff further contends, that, if this evidence was not admissible in an action at common law, it was admissible in an action under the St. of 1887, c. 270, because, by § 3, the amount of compensation, in case of death, is to be assessed "with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable." But, if evidence is not admissible to show culpability, we fail to see how it can be admissible to show the degree of culpability.

At the trial, after the question above referred to had been excluded, one of the defendant's witnesses testified to the manner in which the bank was shored up before the accident; namely, by placing a plank fourteen inches wide horizontally along the bank, about midway between the top and the bottom, he having observed a fissure near the top of the bank about six feet long and a quarter of an inch wide. He and other witnesses testified that they saw no other signs of weakness in the bank before the accident, which was caused by earth falling from below the plank. The plaintiff contends that the evidence excluded would tend to qualify the statements of these witnesses. Without intending to intimate that such would be its effect, it is enough to say that, as in our opinion the question asked was, both upon principle and the great weight of authority, properly excluded when offered, if it became competent, in consequence of evi-

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dence put in by the defendant, the plaintiff should have offered it in rebuttal.

As we are of opinion that in any aspect of the case the question put to the plaintiff's witness was properly excluded, the order must be, *Exceptions overruled.*

WILLIAM H. HILL *vs.* C. F. JEWETT PUBLISHING COMPANY.
LLEWELLYN POWERS *vs.* SAME.

Suffolk. March 26, 1891. — June 26, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Corporation — Shares of Stock — Fraudulent Issue by President — Previous Misconduct.

The president of a corporation, who was not the proper officer to issue certificates of stock, his duty with regard thereto being merely to affix his signature, was allowed access to its blank certificate-book and to the corporate seal, and availed himself thereof to issue forged certificates away from its office. He had, with the knowledge of the corporation, been guilty of previous misconduct in transferring shares of stock standing in his name to a third person, instead of to associate stockholders, as he had agreed to do. *Held*, that the corporation was not liable for the president's act in issuing such forged certificates.

TWO ACTIONS, described in the writ as in contract or tort, to recover damages occasioned by the refusal of the defendant corporation to recognize as valid certain shares of stock held by the plaintiffs, and to issue new certificates therefor. The cases were tried together in this court, before *Morton*, J., who reported them for the consideration of the full court, in substance as follows.

The defendant corporation was organized on August 24, 1886, and its entire capital stock, $75,000, which was divided into 750 shares, was on September 25, 1886, issued to Estes and Lauriat, book publishers, in consideration of merchandise turned over by that firm to the corporation. Clarence F. Jewett, after whom the corporation was named, was made its president, and Walter M. Jackson, a junior partner in that firm, was the treasurer. When the corporation was organized, Estes and Lauriat agreed with Jewett that the latter should have the privilege at any time within a year of having one half the stock issued to him at

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a price which was placed at two thirds of its par value, and on or about August 1, 1887, when both Estes and Lauriat were abroad, Jewett elected to take shares, and at that time stated to Jackson that he could not then pay therefor, but would do so as soon as he could. The certificate of Estes and Lauriat covering the whole issue was thereupon cancelled, and Jackson caused certificates covering half of the stock to be made out to Jewett, with the understanding that he was to give his notes for the price agreed, and Estes and Lauriat were to hold the stock as collateral. Jewett gave his notes to that firm, but Jackson, instead of holding the shares as collateral security therefor, delivered the certificates to Jewett, who took the same and thereupon transferred the shares represented thereby to Evans and Company, who had advanced him money with which to carry on stock speculations. Subsequently Estes and Lauriat ascertained that Jewett had thus transferred the certificates, and, having confidence in Jewett's business ability, redeemed his pledge of the shares to Evans and Company, and took Jewett's notes therefor in addition to the other notes given by him in payment for the stock.

In January, 1888, Jewett was indebted to Estes and Lauriat upon all his notes, and that firm found him to be financially irresponsible, but continued to elect him president of the corporation, and to allow one half of the capital stock to stand in his name. The corporate seal was kept in the office of the corporation, and the book of blank stock certificates was kept in the safe therein, and Jewett had access to both of them. Each plaintiff had lent money to Jewett, and he transferred to the plaintiff in the first case in October, 1888, and to the plaintiff in the second case in October, 1889, as collateral security therefor, a certificate of shares in the defendant corporation, properly indorsed by him, that given the former being for 376 shares, and that to the latter for 375 shares. Both certificates purported to be issued to Jewett on September 25, 1886, and were written upon blanks taken from the back part of the book of blank certificates belonging to the corporation, and bore the corporate seal. Each certificate was signed by Jewett as president, and purported to be signed by Jackson as treasurer, but the latter's signatures thereon were forged by Jewett.

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These certificates were delivered to the plaintiffs by Jewett in their respective offices. Jewett resigned as president of the corporation in April, 1890, and his frauds were subsequently discovered. The returns made by the corporation to the tax commissioner in June, 1887, showed that the whole number of shares stood in the name of Estes and Lauriat, and a like return made in May, 1889, showed that 375 shares stood in their name and 375 in that of Jewett; and a return to the commissioner of corporations made in October, 1889, showed that the same number stood in the name of each. After Jewett's frauds were discovered, the certificates issued to him, dated September, 1886, were cancelled, and a certificate for the same number of shares was regularly issued to Estes and Lauriat. The by-laws of the corporation provided, in article 3, that the president should "sign all certificates of stock," and by article 9, "Each stockholder shall be entitled to a certificate of his stock under the seal of the corporation, and signed by its president and treasurer. Shares may be transferred by an instrument in writing signed by the owner thereof, or by his attorney duly authorized in writing to sell, assign, and transfer the same; such written transfer shall be recorded by the clerk in a book to be kept for that purpose; such records shall be made and kept within the Commonwealth of Massachusetts. The purchaser named in such instrument so recorded shall, on producing the same to the treasurer and delivering to him the former certificate, be entitled to a new certificate."

The plaintiffs did not contend that the signatures upon the certificates purporting to be those of Jackson were genuine, or that any of the money borrowed of the plaintiffs went in any way to the defendant, or to its benefit.

The judge ruled that neither action could be maintained, and ordered a verdict in each case for the defendant. If the ruling was correct, judgment was to be entered on the verdicts; otherwise, the verdicts were to be set aside, and the cases to stand for trial.

R. M. Morse, Jr. & C. E. Hellier, for the plaintiffs.

S. J. Elder, (*W. C. Wait* with him,) for the defendant.

ALLEN, J. The by-laws of the defendant corporation provide that "each stockholder shall be entitled to a certificate of his

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stock under the seal of the corporation, and signed by its president and treasurer." The certificates taken by the respective plaintiffs each called for these two signatures, and purported to bear them. The plaintiffs were therefore apprised of the necessity for two signatures. In point of fact, however, the certificates did not bear the signature of the treasurer, his name having been forged by the president. There was no special provision in the by-laws giving the president anything to do in respect to the issuing of certificates of shares, except a requirement that he should sign all such certificates. Transfers were to be recorded by the clerk. The purchaser named in a transfer so recorded was entitled to a new certificate upon producing the transfer to the treasurer, and delivering to him the former certificate. There was no actual or ostensible authority in the president to issue certificates. He was only to sign them. The certificates taken by the plaintiffs were invalid for want of the two signatures required by the by-laws.

But the plaintiffs contend that the defendant is nevertheless bound to make the certificates good, or is responsible for their being bad, on the ground that, in view of his previous known misconduct, it was negligent in permitting Jewett to remain president of the corporation, and to have control of its certificate-book and seal, and that the cases fall within the principle that, where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by the one whose negligence enabled the third person to commit the fraud.

In order to reach this conclusion, it must be made to appear that the frauds and forgeries of Jewett were such natural and probable results of his continuance in the office of president of the corporation that the defendant ought to have anticipated and guarded against them, and also that the plaintiffs on their part exercised due diligence and precaution in accepting the certificates from him.

In the absence of any previous misconduct on Jewett's part, it could hardly be maintained that there was any negligence on the part of the corporation in keeping its seal and book of certificates of shares where the president could have access to them, so as to be able to remove blank certificates from the end of the book, and impress the corporate seal upon them. We are not

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aware that it is customary for corporations in this country to keep their seals or books of certificates in such a way that access to them can only be had when two or more officers are present. The chief safeguard in respect to the certificates is the necessity of two signatures. And, accordingly, when one who has had confidence reposed in him has availed himself of his opportunity to commit a fraud upon others by means of forgery, it has usually been held in England that the loss was not a natural or probable result of the confidence thus reposed, even though it showed carelessness, and that it was too remote to be properly chargeable upon those who were thus careless in reposing the confidence. *Bank of Ireland* v. *Evans' Charities*, 5 H. L. Cas. 389. *Staple of England* v. *Bank of England*, 21 Q. B. D. 160, 176. *Swan* v. *North British Australasian Co.* 2 H. & C. 175, 189. See also *Vagliano* v. *Bank of England*, 22 Q. B. D. 103, 117; *S. C.* on appeal, 23 Q. B. D. 243, 255, 263.

The plaintiffs rely much on *Shaw* v. *Port Philip Gold Mining Co.* 13 Q. B. D. 103, which in many of its general features much resembles the present case, but with certain differences. In that case the secretary of the defendant company issued a certificate of shares, with the name of a director forged by himself. The person to whom it was issued bought shares on the market, through a broker, who received a transfer signed by the secretary, accompanied by what purported and in all respects appeared to be a regularly issued certificate of those shares. These were deposited at the company's office, with the request for the issue of a new certificate, in the usual way. The new certificate was issued in the usual form by the secretary, but the signature of a director, which was required, was forged. It was a part of the regular and authorized duty of the secretary to receive and examine transfers and certificates of shares, to have transfers registered, to procure the preparation, execution, and signature of certificates with all requisite and prescribed formalities, and thereupon to issue them to the persons entitled to receive them. Moreover, the company after the issue of the certificate paid a dividend thereon, by check signed by the secretary and two directors. The decision of the case, which was not heard before the court of appeal, was placed on the ground that the company had made it the duty of the secretary

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to procure the preparation, execution, and signature of certificates with the prescribed formalities, and thereupon to issue them to the person entitled to receive them. The principal facts upon which the decision turned are wanting in the case before us. The president of the defendant corporation was not the proper officer to issue certificates, and the certificates which the plaintiffs received did not come from the office of the defendant in regular course of business, but they were received by the plaintiffs under private and personal transactions between themselves and Jewett, the president.

The plaintiffs, however, contend that the previous and known misconduct of Jewett had been such that it distinguishes the present case from others, and that by reason thereof the defendant should be held responsible for his acts. This misconduct consisted in pledging his shares to Evans and Company, when he had agreed to pledge them to his associates in the corporation. According to the original understanding, when the corporation was formed, Estes and Lauriat subscribed and paid for the whole of the stock, but there was an agreement under which Jewett was to have the option of buying one half of the stock at a certain price, at any time within one year. Jewett was president of the company, and Jackson, one of the firm of Estes and Lauriat, was treasurer. In the absence of the two senior members of the firm, Jewett elected to take his half of the stock, but stated that he could not very easily pay for it then, and Jackson consented to issue the certificates to him, with the understanding that he was to give his notes for them, and that the firm would hold the stock as collateral. The stock was accordingly issued to Jewett, who took the certificates and did not pledge them to the firm, but afterwards pledged them to Evans and Company. There is no distinct statement how it happened that Jewett was allowed to take away the certificates, instead of pledging them on the spot to the firm, nor how soon afterwards he pledged them to Evans. Apparently, confidence was reposed in him, and at any rate there is nothing to show that any steps were taken to compel him to pledge the shares to the firm according to his promise. What Jackson did in consenting to the issue of the stock to Jewett without retaining them in pledge was within his power as a member of the firm.

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On the whole, we find nothing to show that the corporation or its other members had reason to suppose from what Jewett had done that he would be likely to issue forged certificates of shares, if allowed access to the certificate-book and seal of the corporation; and, accordingly, it is not to be held responsible for his criminal fraud, as for an act made possible by its negligence.

In the cases heretofore determined by this court, where a corporation was held responsible for the fraudulent issue of shares, the certificates were in fact signed by the proper officers whose signatures were required, and there was carelessness on the part of the president in leaving with the treasurer certificates signed in blank by himself, and also carelessness on the part of other officers of the company. *Allen* v. *South Boston Railroad*, 150 Mass. 200.

In each case the entry must be, *Judgment on the verdict.*

P. RAPHAEL & another *vs.* O. REINSTEIN.

Suffolk. March 18, 1891. — June 26, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Sale of Goods — Election to rescind — Replevin — Insolvent Debtor — Proof of Claim.

A seller of goods, who, upon discovering that the sale was induced by fraud, and thereupon replevying part of the goods, subsequently proves a claim for the balance as for goods sold and delivered against the purchaser's estate in insolvency, without objection on the part of the assignee or of any creditor, is not thereby precluded from maintaining his action of replevin.

REPLEVIN of certain clothing. Trial in the Superior Court, before *Dunbar*, J., who reported the case for the determination of this court, in substance as follows.

The plaintiffs, who were wholesale clothing dealers, before October 28, 1889, sold various lots of clothing to one Levy, who was a retail clothing dealer, who never paid for them. On that day Levy made an assignment for the benefit of creditors to the defendant, and the latter took possession of the goods. The

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plaintiffs on the same day, upon learning of this assignment, brought this action, and took from the defendant the clothing in question, which formed a part only of the lots sold by them to Levy. On October 31, Levy went into insolvency, and was duly adjudged an insolvent debtor, and his assignee in insolvency elected to rescind the assignment to the defendant, and intervened to defend this action for the benefit of the estate. The plaintiffs were allowed to prove a claim against the estate for the balance of the clothing sold by them to Levy. The plaintiffs introduced evidence tending to show that the sale of goods to Levy was induced by his fraud.

The defendant asked the judge to rule, that upon all the evidence, and especially by reason of their having proved their claim against the estate in insolvency, the plaintiffs could not maintain the action; but the judge refused so to rule, and submitted the case to the jury on the issue as to whether the goods were obtained by fraud.

The jury returned a verdict for the plaintiffs, for nominal damages. If the defendant was entitled to the ruling requested by him, judgment was to be entered in his favor, and for a return of the goods; otherwise, judgment was to be entered for the plaintiffs upon the verdict.

G. E. Curry, for the plaintiffs.

H. R. Bailey, for the assignee.

MORTON, J. The plaintiffs in this case, after discovering the fraud through which they were induced by the defendant to make the sale, could affirm or rescind the sale. They elected by bringing their writ of replevin to rescind it. That action was based on a claim entirely inconsistent with a valid sale on their part. It rested on the ground that the defendant had wrongfully obtained the goods by misrepresentation and fraud. Having once elected to rescind the sale, and having by their action effectively done so, the plaintiffs could not afterwards change their mind, and treat the sale as a valid one, unless it should appear, which is not the case here, that this election was made in ignorance of certain material facts affecting their rights or their remedies which afterwards came to their knowledge, or, possibly, through inadvertence or mistake of law or fact. *Butler* v. *Hildreth*, 5 Met. 49. *Metcalf* v. *Williams*, 144 Mass.

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452. *Hooker* v. *Olmstead*, 6 Pick. 481. *Holden* v. *Metropolitan National Bank*, 151 Mass. 112. *Nichols* v. *Smith*, 143 Mass. 455. *Washburn* v. *Great Western Ins. Co.* 114 Mass. 175. *Sanger* v. *Wood*, 3 Johns. Ch. 416. The proof offered by them against the debtor's estate, as for goods sold and delivered, was therefore open to the objection on the part of the assignee or of any creditor that the plaintiffs, having elected to avoid the sale on the ground of fraud, could not prove for the balance of the goods not replevied as goods sold and delivered. The fact that no objection was taken to the proof, and that it was therefore allowed by the judge of insolvency, did not annul the election which the plaintiffs had previously and effectively made. It was within the power of the Court of Insolvency at any time to expunge the proof, or to allow it to be altered into a claim for goods wrongfully obtained. Pub. Sts. c. 157, §§ 26, 35.

The proof stands, if it stands at all, not on the ground that it could be rightfully made in the form in which it was allowed, but on the ground that the assignee or creditors have failed to avail themselves of a valid objection to it. It may be added, that the estate, even in the event of the proof standing, will suffer no harm, as the plaintiffs could have proved for goods fraudulently obtained. *Bickford* v. *Barnard*, 8 Allen, 314.

So far it has been assumed that the various lots of goods included in the sale constituted one sale; but it may be that, according to *Young & Conant Manuf. Co.* v. *Wakefield*, 121 Mass. 91, and *Miner* v. *Bradley*, 22 Pick. 457, the different lots could be treated as separate sales, and that the plaintiffs could rescind as to those which they could find and which they have replevied, and treat the sale of the others as valid, and prove accordingly. If that were so, then it is also clear that the proof in question could not operate as a bar to the prosecution of the writ of replevin.

The case of *Seavey* v. *Potter*, 121 Mass. 297, has been much relied on by the defendant. In that case the plaintiffs took notes for the goods sold, and, instead of surrendering them, retained them and proved one of them, after bringing their writ of replevin against the debtor's estate. In order to rescind, they should have returned the notes. They could not rescind in part and prove in part. Not having completed the act of rescission,

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it was rightly held that the writ of replevin would not lie. The case of *Ormsby* v. *Dearborn*, 116 Mass. 386, differs still more from this. The plaintiffs proved their debt for the price of the goods, and then, without withdrawing their proof, sought to maintain replevin for the same goods. The court held that they could not do it, for the reason that they had elected to pursue their claim in insolvency as for a sale, and had not withdrawn the proof before bringing replevin, and the two remedies were inconsistent.

Judgment for the plaintiffs on the verdict.

GEORGE P. DREW *vs.* ELIZABETH C. CARROLL & another.

Barnstable. March 24, 1891. — June 26, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Indian — Estate in Common — Partition — Mortgage.

A deed which conveys all the creditor's real estate in certain towns, "consisting of homestead and dwelling-house I reside in, and outbuildings and woodland and cleared land, of whatsoever name or nature, and however bounded or situated," includes his rights as a tenant in common of undivided lands situated therein.

Under the St. of 1869, c. 463, the members of the tribe of Herring Pond Indians acquired both legal and equitable rights as tenants in common of the undivided lands of the tribe, which they could convey by deed.

If a member of an Indian tribe mortgages the undivided interest acquired by him in its undivided lands, under the St. of 1869, c. 463, and subsequently partition is duly had of such lands, the mortgage lien will attach to the portion passing to the mortgagor.

TORT, against Elizabeth C. Carroll and Shadrach F. Swift, for breaking and entering the plaintiff's close. Trial in the Superior Court, before *Mason*, J., who reported the case for the determination of this court, in substance as follows.

The premises in question were situated in the town of Plymouth, and formed a part of the plantation belonging to the tribe of Herring Pond Indians, which was not allotted among them under the St. of 1850, c. 168, and under § 6 of that chapter remained the common lands of the tribe. Anthony T. Johnson, a member of the tribe, to whom land was allotted under that statute, and who had an interest in such common land, on Janu-

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ary 20, 1870, executed a mortgage to one Briggs of "all the real estate I own in the town of Sandwich and county of Barnstable, and also all the real estate I own in Plymouth, county of Plymouth and State aforesaid, consisting of homestead and dwelling-house I reside in, and outbuildings and woodland and cleared land, of whatsoever name or nature, and however bounded or situated."

Under the St. of 1869, c. 463, upon due proceedings begun in the Probate Court in September, 1870, commissioners were appointed by that court to make partition of such common land, and, Johnson having meanwhile died, allotted the land, including the premises in question, which would have been his if he had lived, to "heirs of Anthony T. Johnson"; and their report was confirmed by the Probate Court. The plaintiff claimed title by mesne conveyance through one of the heirs of Johnson. The widow of Briggs, as his devisee, became the owner of the mortgage, and, after duly entering to foreclose the same for breach of condition, assigned to the first named defendant all her right, title, and interest acquired by such entry; and the plaintiff received notice of the assignment on September 14, 1889. The first named defendant thereupon took possession of the premises in question, claiming the rights of a mortgagee in possession of land under a mortgage for condition broken, and, together with Swift as her agent, entered upon the premises and took a portion of a cranberry crop growing thereon; and this was the tort complained of by the plaintiff.

The judge upon these facts ordered judgment for the plaintiff in the sum of twenty dollars, which was agreed to be the damages sustained by the plaintiff. If, as matter of law, the ruling was erroneous, judgment was to be entered for the defendants; otherwise, for the plaintiff.

C. F. Chamberlayne, for the plaintiff.

S. M. Thomas, for the defendants.

KNOWLTON, J. The fundamental question in this case is whether, under the St. of 1869, c. 463, the members of the tribe of Herring Pond Indians acquired rights in the lands held in common belonging to that tribe, which they could transfer by deed. On January 20, 1870, Anthony T. Johnson executed a mortgage of real estate to Seth Briggs, and the defendant Eliza-

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beth C. Carroll now holds the title which was created by that mortgage. The property covered by the mortgage was described as follows: "All the real estate I own in the town of Sandwich and county of Barnstable, and also all the real estate I own in Plymouth, county of Plymouth and State aforesaid, consisting of homestead and dwelling-house I reside in, and outbuildings and woodland and cleared land, of whatsoever name or nature, and however bounded or situated." This description is in the most comprehensive terms, and we are of opinion that it is broad enough to include his rights, if he had any, as tenant in common of undivided lands.

In determining whether he had an interest which he could convey, we must consider the language and the purpose of the statute above referred to. Section 1 of the act made all Indians in the Commonwealth citizens of the Commonwealth, "entitled to all the rights, privileges and immunities, and subject to all the duties and liabilities to which citizens of this Commonwealth are entitled or subject." Section 2 declared that all Indian lands, "rightfully held by any Indian in severalty, and all such lands which have been or may be set off to any Indian, shall be and become the property of such person and his heirs in fee simple," with a proviso exempting them from attachment or seizure on execution for a debt or liability existing before the passage of the act. Having all the rights of a citizen, an Indian under this statute could sell or control in any way all his interests in property, whether legal or equitable, as freely as any one else. It remains to inquire whether the statute gave him any rights which were transferable in the common lands.

Previously, all the common lands had been held and controlled by the Commonwealth for the benefit of the Indians, who were treated as wards of the State. The State recognized only certain equitable rights of ownership in the Indians, and it kept their property, and exercised a guardianship over them to protect them from the consequences of their own improvidence. *Brown* v. *Wenham*, 10 Met. 495. *Mayhew* v. *Gay Head*, 13 Allen, 129. *Danzell* v. *Webquish*, 108 Mass. 133. *Lynn* v. *Nahant*, 113 Mass. 433, 449. *Coombs, petitioner*, 127 Mass. 278. *Pells* v. *Webquish*, 129 Mass. 469. The statute above referred to put them, for the most part, on the basis of ordinary citizenship. It

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gave them all the rights of citizens, and confirmed their titles to their individual property. In regard to lands held in common, it made an exception of the Indians of Mashpee and Gay Head, and continued the State's ownership and control of their common lands for their benefit, until the passage of the St. of 1870, c. 293. *Coombs, petitioner*, 127 Mass. 278. As to all others, it gave every Indian a right immediately to have his share of the common lands of the tribe set out to him, or sold for his benefit. At the same time, it gave him a right to have his share in any funds, or other property held in trust for the tribe, paid over to him. A method was provided through which his title might be established. Commissioners were to be appointed by the Probate Court, who were to act under the direction of the court, and determine all necessary questions, and make their report, on which the court would make its order or decree. Any person deeming himself aggrieved might appeal to the Supreme Judicial Court. As soon as this statute took effect, every Indian belonging to the Herring Pond tribe had precisely the same kind of right in the lands of the tribe that an ordinary tenant in common has in the lands held by himself and his cotenants. He had a right, on application, to have his share set off to him, to be held in severalty, unless the commissioners should adjudge that it was for the interest of the owners to have it sold, and in that case he was entitled to his share of the proceeds. Under our general laws, any tenant in common is liable to be compelled to receive his share of the proceeds of the sale of the lands held in common, if the court deems a sale advantageous to the parties. Pub. Sts. c. 178, § 65. We can see no particular in which the right of an Indian in the common lands of the Herring Pond tribe, under the St. of 1869, c. 463, differed from the right of other tenants in common. The difference in procedure in determining his interest does not affect the nature of that interest. His right was vested and enforceable the moment that the statute took effect. That he had from that time an equitable right, of which he could not be deprived, can hardly be questioned. It seems to us better, and more consistent with the purpose of the statute, to hold that he had a legal right as well. His legal title was not created by the decree of the Probate Court, but it was created by the statute, and only declared by the decree of the court, on

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the report of the commissioners, according to the facts. This seems to have been the view taken by the commissioners and by the Probate Court when, after his death, they set off his share to his heirs.

Since he had a title to an undivided interest when he made the mortgage to Briggs, his interest passed to Briggs under the mortgage, and when, by the proceedings for partition, the shares of all the others were set out in other parts of the land, and his was set out in the premises described in the declaration, the right of the mortgagee attached to these premises. By our general laws in regard to partition, it is expressly provided that a person having a mortgage, attachment, or other lien on the share of the part owner shall be concluded by the judgment, so far as it respects the partition and the assignment of the shares, but his lien shall remain in force upon the part assigned to or left for the part owner. Pub. Sts. c. 178, § 44. If there were no such statute, he would doubtless have a right to avail himself of his lien upon the part of the land which passed to the person from whom he takes title. *Bradley* v. *Fuller*, 23 Pick. 1. *Brown* v. *Bailey*, 1 Met. 254. *Torrey* v. *Cook*, 116 Mass. 163, 164.

In the present case, if that makes any difference, the mortgagee has ratified and confirmed the partition by entering upon the land and holding possession of it. We are of opinion that the defendant Carroll, who has the mortgage title, is lawfully in possession under her mortgage, and it follows that there must be, *Judgment for the defendant.*

THEODORE M. LILIENTHAL & another *vs.* SUFFOLK BREWING COMPANY.

Suffolk. January 23, 1891. — June 27, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, & MORTON, JJ.

Memorandum of Sale — Condition subsequent — Fraud.

The selling agent of a hop dealer told a brewer that hops were worth a certain price, and the brewer replied he did not believe it. At a subsequent interview, upon the agent's saying the price had advanced, the brewer told him that he

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had no means of information and was not in the market for hops, but finally said he would sign a memorandum for a car-load on condition that, if on his return from a projected trip he found "it was not the market price, it will be no sale," at the same time signing an unqualified memorandum of the purchase. The dealer confirmed the sale by letter, and the brewer upon his return, finding that the price was incorrectly stated by the agent, replied, complaining that, although he "had no business to be ignorant of the state of the market," the agent had misrepresented it, and unless there was some concession he would not accept the hops, but said nothing of the condition; and later he refused the hops. *Held*, in an action to recover the price, that the condition was a condition subsequent, that there was no reliance by the defendant on the agent's statement, and that neither constituted a defence.

CONTRACT to recover the price of hops sold by the plaintiffs to the defendant. Trial in the Superior Court, before *Staples*, J., who ordered a verdict for the plaintiffs, and reported the case for the determination of this court. The facts appear in the opinion.

A. Hemenway, for the defendant.

L. D. Brandeis, for the plaintiffs.

HOLMES, J. This is an action of contract, for refusing to accept and pay for seventy bales of hops, bought of the plaintiffs by the defendant. The defences are that the defendant was induced to make the contract by the fraudulent representations of the plaintiffs' agent, one Horst, as to the market price of hops, and that the agreement was made subject to a condition on the same matter which was not satisfied. According to the testimony of Smith, the defendant's president, who made the bargain with Horst, Horst called on him several times, trying to sell hops. On a Saturday Horst said that hops were worth twenty-five cents, and Smith told him he did not care, he did not believe hops were worth twenty-five cents. On the next Monday, September 10, 1888, Horst called again and said that hops had advanced very much since last week; that they were now thirty cents a pound. Smith said he did not care, he was not in want of hops; but being urged, said, "If hops are going, as you say, very high, I will buy ten bales, and run the risk, at thirty cents a pound." Horst refused, and, pulling out some telegrams written in hieroglyphics, stated that hops before a week would be thirty-five cents. Smith told him he had no means of information; at all events, he was not in the market for hops; but, after a good deal of urging, he told him he would sign a memoran-

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dum for a car-load of seventy bales, on the condition that, "when I return from Canada and find out that it was not the market price, it will be no sale." At the same time Smith signed and delivered a memorandum for the defendant: "We have this day bought of Lilienthal Bros. seventy (70) bales," etc., stating the terms of the bargain, and mentioning no condition. On the 13th, the plaintiffs wrote confirming the sale, and thanking the defendant. Smith further testified that on his return from Canada, on September 24, he found that the best hops in Boston were offered for twenty-five cents on September 10, and we will assume there was other evidence that that, or about that, was the market price. On September 25, Smith wrote to the plaintiffs, acknowledging their letters, and saying nothing of the alleged condition, but complaining that, although "of course I had no business to be ignorant of the true state of the market," Horst had misrepresented it, and that unless there was some concession he should not accept the hops. Later, the hops were refused.

So far as the alleged condition goes, it seems to us impossible to construe it as a condition precedent to the existence of the contract, as in *Wilson* v. *Powers*, 131 Mass. 539. The language testified to imports that a contract has been made, or is about to be made, which is to be off in a certain event thereafter; not that the defendant will make a contract with the plaintiffs at some time in the future, in case Smith finds Horst's statement to be true. The common sense of the thing, and the correspondence of the parties, if consistent with the existence of any condition at all, lead to the same result. The plaintiffs assume, in their letter, that a sale has taken place. The defendant, in his answer, does the same thing. He says he gave Horst an order for seventy bales, and his suggestion that Horst misrepresented the market price, as a ground for a concession, is quite inconsistent with the notion that the moment only then had arrived for making a contract, and that its existence depended on what he should then have discovered for himself touching the market price.

It is admitted that, if the alleged condition was a condition subsequent, the defendant was not entitled to prove or to rely upon it. There could be no argument that it was a subsequent modification of the written memorandum. It was strictly con-

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temporaneous talk. *Clark* v. *Houghton*, 12 Gray, 38, 41. This being so, of course the defendant could not modify by spoken words the effect of a writing signed by it, which purported to set forth all the terms of the bargain, and to bind the defendant unconditionally to accept the hops. *Davis* v. *Randall*, 115 Mass. 547. *Batchelder* v. *Queen Ins. Co.* 135 Mass. 449. *Gordon* v. *Niemann*, 118 N. Y. 152. *Daly* v. *W. W. Kimball Co.* 67 Iowa, 132. As the foregoing considerations justify the ruling of the court below, that the alleged condition was no defence, we need go no further.

Next as to fraud. *Prima facie*, a statement to an experienced dealer in hops as to the market value of the article he is asked to buy is dealer's talk on a subject about which the seller has a right to assume that the buyer will make up his mind for himself, the means of information being equally open to both. *Manning* v. *Albee*, 11 Allen, 520, 522. *Poland* v. *Brownell*, 131 Mass. 138. *Deming* v. *Darling*, 148 Mass. 504. *Foley* v. *Cowgill*, 5 Blackf. 18. *Cronk* v. *Cole*, 10 Ind. 485. *Graffenstein* v. *Epstein*, 23 Kans. 443. Assuming, for the sake of argument, that a case might be supposed in which a jury would be warranted in finding, from other facts beside the mere making of the representation, that the buyer reasonably surrendered his judgment to the seller, (*Whiteside* v. *Brawley*, 152 Mass. 133,) this is not such a case. There were no such other facts. Moreover, Smith's answer to Horst on Saturday was direct, that he did not believe Horst's statement. So on Monday, Smith's answer to Horst, that he had no means of information, imported in polite terms that he did not rely upon Horst, and if, as he says, Smith made a condition that, if he found the price given was not the market price, the sale was to be off, he told Horst in effect that he did not rely upon him, but meant to find out for himself. The only fair inference from the evidence for the defendant is, that its agent relied, not upon Horst's statements, but upon an oral condition, which fails for the reasons which we have given.

Judgment on the verdict.

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MATTHEW MERRIGAN *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

CATHERINE MERRIGAN *vs.* SAME.

Suffolk. January 13, 1891. — June 27, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Railroad — Gates at Grade Crossing — Admissions — Exceptions.

The erection by a railroad company of gates at the crossing of a highway at grade by its tracks within the limits of a city, shortly after an order passed by the mayor and aldermen requesting it to erect such gates is communicated to the company, may be treated as an admission, unless explained, that the gates were reasonably necessary for the public safety.

The question whether such an admission is more applicable to busy days of the week, when the gates are often lowered, than to Sunday, when they are lowered during one hour only, and that not the hour when an accident occurred at the crossing, is for the jury rather than for the court.

In an action against a railroad company for personal injuries sustained by a traveller at a crossing of a highway at grade by its tracks, an instruction to the jury that the existence there of gates, seemingly intended to be closed when trains pass, did not excuse him from looking before crossing, but that he had a right to take the fact into consideration on the question to what extent he would look, is not contradictory, and is correct.

No exception lies to a refusal to give an instruction requested, if it is given in substance.

TWO ACTIONS OF TORT, for personal injuries occasioned to the plaintiffs by a collision at a crossing at grade of a highway by the defendant's railroad in East Boston. The cases were tried together in the Superior Court, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show that on Sunday afternoon, August 19, 1888, at about two o'clock, the plaintiffs, who were husband and wife, were driving along Bennington Street in East Boston in a covered carriage, and were approaching from the west a crossing at grade of that highway, first by the double tracks of the Boston and Maine Railroad, and then by those of the defendant, which at that point ran parallel and alongside each other from north to south; that the afternoon was pleasant and the weather was clear; that just west of the Boston and

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Maine tracks ran Bremen Street across Bennington Street at an angle, and parallel with such railroad tracks; that from the westerly line of Bremen Street to the westerly rail of the easterly track of the defendant's railroad is about one hundred feet in a direct line, but along the line of Bennington Street the distance was somewhat farther; that from that line at a point in the middle of Bennington Street there was an uninterrupted view for half a mile southerly along such easterly track; that as the plaintiffs approached the crossing a train of the defendant was approaching from the south along this easterly track; that there were gates at the crossing, which were up at the time and were not lowered, and there was neither gateman nor flagman at the crossing; that the flagman placed at the crossing, who was employed by the Boston and Maine Railroad and paid by both companies, was never on duty on Sunday except between eleven and twelve o'clock in the forenoon, and the gates were never lowered on Sunday except during that hour; that the bell of the locomotive engine of this train was not rung or its whistle sounded as the train approached the crossing; that the plaintiffs in crossing Bremen Street both looked along the tracks in both directions, but could not see the train because of cars standing in the way on other tracks; and that Mr. Merrigan then drove along, and, the carriage coming into collision with the train, the plaintiffs severally were injured. The evidence that the plaintiffs could not see the train before proceeding to cross the defendant's track was contradicted, and the defendant offered evidence that at the time the plaintiffs looked the train was in plain sight, and not more than five hundred feet from the crossing.

There was evidence that the gates at the crossing were erected about eight or nine years before the accident; and the plaintiffs offered in evidence an order of the mayor and aldermen of Boston, passed in June, 1879, requesting the defendant to erect gates at this crossing, and service of this order upon the defendant's treasurer was admitted by the defendant. The evidence thus offered was admitted, against the defendant's objection, and the defendant excepted.

The judge instructed the jury that this order was not material on the question whether gates were there required or not, but added: "If you find that that order was communicated to the

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railroad and that they acted thereon, or that action was taken thereon by their consent and procurement, then, so far as action was taken by the railroad, you may properly consider it as an admission on the part of the road that such a thing is reasonably necessary, — that those gates were reasonably necessary for the public security." To this instruction the defendant excepted.

The defendant requested the judge to rule as follows: "If the jury find from the evidence that the plaintiff, before entering upon the crossing, and at a time when he was within one hundred and fifty feet of the track upon which the defendant's train was approaching, looked along the track in the direction of the train, and that at that time the train was visible to any one who looked, and that it was within five or six hundred feet of the crossing, and that the plaintiff then kept on and endeavored to cross the tracks, he cannot recover in this action, and the verdict must be for the defendant."

The judge refused so to rule, but, having instructed them that the act of the plaintiff in the first case in driving upon the crossing bound his wife, further instructed them: "I instruct you that this plaintiff, travelling upon that highway in broad daylight, in the conditions shown by the plaintiff, was bound to look and see whether a train was approaching. . . . If he approaches a crossing where there are gates, which by their shape and appearance indicate to him that it is the custom to shut them when trains pass, or that they are there for the purpose of being shut when trains pass, he may take that fact into consideration on the question of how much he himself must look, but it does not excuse him from looking. He must look out for himself, and has no right to rely wholly upon the gates. On the question of how far he shall look, and to what extent he shall look, he may properly take the existence of the gates into consideration. . . . If he looked, he must be held to have seen that which was plainly to be seen where he looked, and if he looked to the extent to which you think he ought to have looked, and that engine was in the line of his vision plainly to be seen, he must be held to have seen it, there being no suggestion of a defect of vision on his part; and if, seeing the engine approaching the highway, he chose to start across and take his chances, the damage must rest where it falls, and is in no degree attributable to the railroad

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corporation in such a manner as that he can recover of them for such damage."

The judge then gave the following ruling requested by the defendant: "If, when the plaintiff approached the crossing and came within the limits of Bremen Street, the train on the defendant's railroad was in plain sight and approaching the crossing, it was the plaintiff's duty to look and not to attempt to cross, and if he did look and then attempted to drive across, and his horse or carriage was struck by the train, he cannot recover in this action."

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

The cases were argued at the bar in January, 1891, and afterwards, in June, were submitted on the briefs to all the judges, except *Field*, C. J.

Samuel Hoar, (*W. Hudson* with him,) for the defendant.

F. Ranney, for the plaintiffs.

HOLMES, J. The first exception is to the admission of an order of the mayor and aldermen of Boston requesting the defendant to erect gates at the crossing where the accident occurred, coupled with evidence that gates were placed there about the time the order was communicated to the defendant. The second exception is to an instruction to the jury, that, if they found that the defendant acted or procured action upon the order, they might consider it as an admission by the defendant that the gates were reasonably necessary for the public security. The mere fact that the gates were there would not be such an admission. *Menard* v. *Boston & Maine Railroad*, 150 Mass. 386. But if gates were put up in consequence of a representation that public safety required them, the act takes a color from the representation which led to it, and, unless otherwise explained, imports more or less assent to the representation. The order of the mayor and aldermen was such a representation. If it had not been complied with, an application might have been made to the county commissioners, who might have enforced compliance. St. 1874, c. 372, § 126. Pub. Sts. c. 112, § 166. If the order was communicated to the defendant, and shortly afterwards the gates were put up, the jury were at liberty to infer that the gates were put up in consequence of the order, and thence

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to deduce an admission by the defendant, whether the defendant put up the gates itself or procured them to be put up by the Boston and Maine Railroad. It is suggested that an admission applicable to the busy parts of the week would not apply to Sunday afternoon. But the distinction seems to us rather for the jury than for the court. The plaintiffs had a right to show the general character of the crossing.

The judge instructed the jury that the existence of gates, seemingly intended to be shut when trains pass, did not excuse the plaintiff from looking before crossing, but that he had a right to take the fact into consideration on the question to what extent he would look. This instruction does not seem to us contradictory, and it does appear to us correct. We believe that it accurately expresses the actual effect of an open gate at a railroad crossing upon the minds of careful people, and it is in accordance with the decisions as to flagmen whose attitude conveys the impression that there is no present danger. *Johanson* v. *Boston & Maine Railroad*, 153 Mass. 57. One or two words in the charge, taken by themselves, might have conveyed the notion that the distance, as well as the extent to which the plaintiff was bound to look, was affected by the gates being open. But we do not understand that to be the meaning of the language, and attention was not called to the possible ambiguity by the exception.

The only other exception not waived is to the refusal of the judge to give an instruction requested. But although not given in terms, it was given in substance, both in the course of the charge, and again, in answer to a further request of the defendant, at the end of it. In the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.

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LEWIS H. WILSON *vs.* AUGUSTA A. WILSON.

Suffolk. March 3, 1891. — June 27, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Adultery — Connivance — Divorce.

A husband who does nothing to encourage his wife to commit adultery, and does not directly or indirectly throw opportunities therefor in her way, but who, suspecting her thereof, watches her and suffers her to avail herself of an opportunity which she had already arranged for without any knowledge on his part, is not guilty of connivance, even if in so doing he hopes to obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason.

LIBEL by a husband to obtain a divorce on the ground of adultery. Trial in the Superior Court, before *Lathrop*, J., who found that the libellant was guilty of connivance, and ordered a decree to be entered dismissing the libel, and reported the case for the determination of this court. If the evidence did not warrant the finding, or if, as matter of law, the order was wrong, a new trial was to be granted; otherwise, the decree was to stand. The nature of the evidence appears in the opinion.

The case was submitted on briefs on March 8, 1891, and afterwards, in June following, was re-submitted on the same briefs to all the judges.

W. B. Orcutt & E. J. Jenkins, for the libellant.

J. G. Holt, for the libellee.

MORTON, J. This case turns on the question whether the finding of the court was correct, that the libellant was, upon the evidence, guilty of connivance.

The libellant did nothing to encourage his wife to commit adultery, and did not, directly or indirectly, throw opportunities in her way. Until the day he detected her, the report does not show that any unusual or improper acts had occurred in his presence between her and any other man. He had suspected and had watched her, but had not obtained proof of her guilt, and had not till the day he caught her had the assistance of a detective or police officer. On that day he came from his home in Dorchester, and waited, suspecting she might come to Boston also, and might leave the Dorchester street car at the corner

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of Federal Street and Beach Street in Boston, which she did. She met a man by the name of Andrews, whom there is nothing to show the libellant had ever seen or heard of before, and went with him to a hotel. The libellant followed her, and after waiting in the hotel an hour, and listening ten or fifteen minutes at the door of the room where they were, burst it open and found them in bed together. He hoped she would commit adultery, so that he could get a divorce, and he gave her plenty of time so that she might do it, and did not warn her. He thought before this that she had committed adultery.

We think, as matter of law, it cannot be said, on this state of facts, that the libellant was guilty of connivance. It is true that he could have prevented his wife from committing adultery, and did not; on the contrary, he wished she would, that he might have evidence on which he could get a divorce. But he did not make, or aid in any way in making, the opportunity. He did no overt act, unless keeping still was one, which it clearly was not. It was not a case where he supposed his wife was about to commit adultery for the first time, and where it would have been his duty to give her the assistance which husband and wife are mutually expected to give to each other. It certainly cannot be held that a husband who suspects his wife of infidelity can take no means to ascertain the truth of his suspicions without being deemed guilty of connivance. "There is a manifest distinction," says the court in *Robbins* v. *Robbins*, 140 Mass. 528, 531, "between the desire and intent of a husband that his wife, whom he believes to be chaste, should commit adultery, and his desire and intent to obtain evidence against his wife, whom he believes already to have committed adultery, and to persist in her adulterous practices whenever she has opportunity." Merely suffering in a single case a wife whom he already suspects of having been guilty of adultery to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife whom he suspects of adultery, in order to obtain proof of that fact. He may do it with the hope and purpose of getting a divorce if he obtains sufficient evidence.

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He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed. 2 Bish. Marriage & Divorce, (5th ed.) § 9. *Timmings* v. *Timmings*, 3 Hagg. Eccl. 76. *Stone* v. *Stone*, 1 Rob. Eccl. 99, 101. *Phillips* v. *Phillips*, 10 Jur. 829.

The law does not compel a husband to remain always bound to a wife whom he suspects, and it allows him, as it does other parties who think they are being wronged, reasonable scope in their efforts to discover whether the suspected party is or is not guilty, without themselves being adjudged guilty of conniving at the crime which they are seeking to detect. *Robbins* v. *Robbins*, 140 Mass. 528, 531. In a libel for divorce for desertion, the willingness, or even the desire, of the deserted party to be deserted, so long as it is not expressed in conduct or acts to the other party, will not bar a divorce. *Ford* v. *Ford*, 143 Mass. 577. Of course, as the court says in that case, there is always the difficulty of believing that the desire or willingness did not manifest itself in conduct or acts expressive of it to the other party. But nothing of the sort appears here.

In *St. Paul* v. *St. Paul*, L. R. 1 P. & D. 739, the court held that the neglect of the husband which would justify the court in withholding a decree in his favor, under a statute which provided that the court might do so where the husband was guilty of "such wilful neglect or misconduct as . . . conduced to the adultery," must be such neglect as conduced to the wife's fall, and not neglect conducing to any particular act of adultery subsequent to her fall.

The case of *Morrison* v. *Morrison*, 136 Mass. 310, referred to by the libellee, differs from this. In that case the husband, after he had been cautioned to watch his wife, made opportunities for her and her suspected paramour to be together alone, witnessed without objection acts of considerable familiarity between them, said nothing whatever to his wife intimating any disapproval of her conduct, and in other ways acted in such a manner as to induce the adultery for which he was watching.

In the opinion of a majority of the court, there must therefore, according to the reservation of the report, be a new trial, and it is *So ordered.*

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KARL A. CORLIN *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. March 5, 1891. — June 27, 1891.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Street Railway — Electric Car — Contributory Negligence — Due Care.

In an action against a street railway company to recover for personal injuries occasioned to the plaintiff, a man accustomed to getting on and off street cars in motion, the plaintiff's evidence tended to show that he signalled the driver of an approaching car propelled by electricity to stop; that the driver saw him and made a motion with the motor crank; that the car seemed to slacken its speed, and as it was slackening the plaintiff put his right hand on the platform railing to get on, but the car, which had not come "to a dead stop," shot forward, and he fell to the ground and received the injuries complained of. *Held*, that there was evidence for the jury whether the plaintiff was in the exercise of due care.

TORT, for personal injuries occasioned to the plaintiff while attempting to get on an electric car of the defendant company while in motion. Trial in the Superior Court, before *Thompson*, J., who allowed a bill of exceptions, which, so far as material to the point decided, was as follows.

The plaintiff, who was the only witness, testified that he was thirty-three years of age, and had been accustomed for twelve years to ride in street cars every day, and to get on to them and to leave them while in motion; that about five o'clock in the afternoon of August 10, 1889, he stood upon the sidewalk of North Avenue in Cambridge awaiting a street car; that seeing a car propelled by electricity, to which an open car was attached, approaching him, he raised his hand to stop the car; that the driver of the car looked at him and made a motion with the motor crank; that it seemed to him that the car slackened its speed when the driver turned the crank, and that it was "in the act of slackening" when it reached him; that as the car came up to him it had not come to "a dead stop"; that the plaintiff then reached out his hand to take hold of the railing of the rear platform of the motor car so as to get upon that car, but "it was

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taken right away with a sudden pull," and he was thrown to the ground and struck by the running-board of the open car, which projected outward some twelve or thirteen inches beyond the line of the motor car, and received the injuries complained of.

At the conclusion of the plaintiff's testimony, the judge, at the defendant's request, ruled that, upon the evidence, the plaintiff was not entitled to recover, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in March, 1891, and afterwards, in June following, was submitted to all the judges, except *Holmes*, J.

G. H. Ryther, for the plaintiff.

M. F. Dickinson, Jr. & S. Williston, for the defendant.

KNOWLTON, J. It was admitted by the defendant, at the argument, that there was evidence on which the jury might have found that the defendant was negligent. The only ground on which it was contended that the ruling of the court should be sustained was the alleged absence of evidence that the plaintiff was in the exercise of due care. The defendant conceded that the mere fact that the plaintiff was getting on a street car propelled by electricity while it was in motion did not show negligence on his part, but argued that the court should take judicial notice that street cars propelled by electricity often run at a rate of speed which makes it dangerous for passengers to attempt to get upon them, and that the plaintiff failed to show that this car was not so running. It has often been held that the fact that a horse car is in motion does not make it negligent, as matter of law, for a passenger to attempt to get upon it, although we can imagine cases in which, on account of the rate of speed, or for other reasons, it would be negligence in law for a person of ordinary strength and agility to do so. *Meesel* v. *Lynn & Boston Railroad*, 8 Allen, 234. *Murphy* v. *Union Railway*, 118 Mass. 228. *McDonough* v. *Metropolitan Railroad*, 137 Mass. 210. *Briggs* v. *Union Street Railway*, 148 Mass. 72.

There is nothing in the bill of exceptions to show that any different rule should be applied than if the car had been a horse car, moving at the same rate of speed. It is to be inferred that the car was designed for the transportation of passengers from place to place along the public streets, and was to take them up

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and leave them as requested. There were no platforms or other conveniences for getting on or off along the route, and if there was a rule requiring the car to be stopped to receive and discharge passengers only at designated places, the bill of exceptions does not show it. On the question whether the plaintiff was using due care, such a rule would be immaterial, unless he knew it, or ought to have known it. It is probable that the car could be as easily controlled as a horse car, and we see no reason for applying to it a rule of law which is not applicable to horse cars. The plaintiff described, in a general way, his own conduct, the conduct of the driver, and the motion of the car just before and at the time of the accident. He did not give in express terms his estimate of the rate of speed at which the car was going. If a jury could properly have found from his testimony that he was acting as men of ordinary prudence are accustomed to act in getting on the car under the circumstances, the ruling of the court was erroneous.

It has been held that the absence of evidence of the particulars of a plaintiff's conduct is not fatal to his recovery where negligence of the defendant is shown, and where it appears in general that the plaintiff was in the line of his duty, in a place where no particular act of precaution was required, and where it does not appear that he was guilty of any act of negligence. In such a case, it may be inferred that he was ordinarily careful. *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379.

In the present case, the plaintiff testified that, when the car approached him, he signalled to the driver to stop by raising his hand, and that the driver looked straight at him and made a motion with the motor crank; that it seemed to him that the car slackened its speed, and as it was slackening up he put his right hand on the railing to get on, but the car shot forward as he took hold of the railing, and he fell to the ground. Being asked whether the car had stopped when he put out his hand to get on, he answered, "Not to a dead stop." There was some evidence tending to show that the speed of the car was diminished just before the plaintiff attempted to get on, and was then suddenly increased; and we cannot say, as matter of law, that the plaintiff was negligent. We think it was a question for the jury, on all the evidence, whether he was using such care as ordinary

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persons are accustomed to use under like circumstances. There is much to indicate that the car was going too fast to give the plaintiff an opportunity to get upon it safely, and that he ought not to have tried to get on; but in the opinion of a majority of the court, the question presented by his account of the circumstances is one of fact rather than of law, and it should have been submitted to the jury. *Exceptions sustained.*

THOMAS MORAN *vs.* LAURA E. SOMES.

Middlesex. March 9, 1891. — June 27, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Divorce — Alimony — Tenancy by the Curtesy — Trust — Cloud upon Title.

A husband obtained in another State a legal and absolute divorce from his wife, who resided and was the owner of land in this State, for a cause other than adultery. Before he had instituted proceedings for alimony here, or sought to secure the same by attachment or otherwise, she conveyed such land to a third person. *Held*, that such former husband had no right or interest as tenant by the curtesy initiate in the land, nor any interest therein depending on any possible claim for alimony.

The owner of four undivided fifths of a parcel of land, one fifth by inheritance and the other three fifths by purchase by separate conveyances from his three brothers, conveyed "all his right, title, and interest in and to" such parcel, "my interest in such estate being three undivided fifths of the same," and referred to two only of the three conveyances. The grantee conveyed the land to the grantor's wife, who conveyed them to a *bona fide* purchaser for value. Thereafter the original grantor claimed an undivided fifth in the parcel, and notified such purchaser that the conveyance was on a trust for the benefit of his children; but this was not declared in writing. *Held*, that such grantor had conveyed all his interest in the land, and that the notice did not in any way affect or cloud such purchaser's title.

CONTRACT, for breach of warranty in a deed of land given by the defendant to the plaintiff. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on agreed facts, in substance as follows.

On May 23, 1862, Samuel M. Somes, then the husband of the defendant, was the owner of four undivided fifths of a parcel of land, one fifth by inheritance from his mother, and the three

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remaining fifths by purchase from his three brothers, Francis L., Hiram S., and George. On that day he executed a deed to one Rand, whereby he conveyed "unto the said Rand, and his heirs and assigns, all my right, title, and interest in and to" such parcel, "being the same estate described in a deed from Francis L. Somes to me, . . . and a deed from Hiram S. Somes to me, . . . my interest in said estate being three undivided fifths of the same." Rand immediately conveyed to the defendant his "right, title, and interest" in and to said parcel, "being the same estate conveyed to me by Samuel M. Somes by deed of even date herewith." Subsequently, the defendant acquired the outstanding undivided fifth by a sufficient conveyance, and Samuel M. Somes obtained a legal and absolute divorce from the defendant in the State of Missouri, on his own petition, for a cause other than adultery. Afterwards, on May 21, 1890, the defendant agreed to convey this parcel to the plaintiff forthwith, and on the same day executed and delivered to him a warranty deed of the same, in due form, as free from all incumbrances. Subsequent to that date Samuel M. Somes notified the plaintiff in writing that he still owned an undivided fifth in such parcel, and by his deed to Rand he intended to convey three undivided fifths only; and that it was understood between himself and the defendant that the interest so conveyed by him was to be held in trust by her for the benefit of their three children. The plaintiff, however, was ignorant of the existence of Samuel M. Somes, and of his claim, as well as of any trust in the parcel, no record of which appeared anywhere in writing.

The plaintiff contended that, when the defendant executed her deed to him, she owned only four undivided fifths thereof, and that this was all that she could convey; and that Samuel M. Somes still had his right and interest by the curtesy and alimony in such parcel, both of which were incumbrances upon the land.

If the defendant had conveyed the entire interest of Samuel M. Somes in the parcel, if the latter had no right by the curtesy or otherwise in such parcel, and if his notice to the plaintiff did not in any way affect the plaintiff's title, even if his statement therein was true, judgment was to be entered for the defendant; otherwise, damages were to be assessed to the plaintiff.

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J. P. Lyons, for the plaintiff.

J. J. Sullivan, for the defendant.

MORTON, J. 1. The agreed facts state that, prior to the making of the deed from the defendant to the plaintiff, the husband of the defendant had obtained in Missouri a legal and absolute divorce from her for a cause other than adultery. Under the statutes of this State, the defendant therefore became entitled to the immediate possession of all her real estate, in like manner as if her husband were dead; in which event he could not, of course, have any claim upon it. The former husband of the defendant has therefore no right or interest as tenant by the curtesy initiate in said land. Pub. Sts. c. 146, § 24. *Dunham* v. *Dunham*, 128 Mass. 34.

2. Even if the divorce obtained by the defendant's former husband in Missouri could be made the ground of an application by him for alimony in this State from the defendant, (which we do not intimate,) the only way in which he could obtain a lien upon the property of the defendant to recover the payment of any sum that might be awarded him would be by attachment or other suitable process. Not only was there nothing of the kind when the conveyance was made, but no proceedings had been commenced by the former husband. He has no interest in said lot, therefore, depending on any possible claim which he had or might make or have against the defendant for alimony.

3. No trust in lands in this State, except such as may arise or result by implication of law, can be created or declared, unless by an instrument in writing signed by the party or his attorney creating or declaring the trust. Pub. Sts. c. 141, § 1. The trust set up by the former husband of the defendant in regard to said land is, therefore, invalid, and cannot be enforced, even if the facts concerning the same be as he alleges. *Campbell* v. *Brown*, 129 Mass. 23.

4. We think the deed from Somes to Rand must be held to convey all the interest which the grantor had, at the time of its execution and delivery, in the tract described in it. It must be taken most strongly against the grantor, and the words "all my right, title, and interest" are not to be cut down by the subsequent reference to the two deeds, and the statement that his

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interest in the estate is three undivided fifths, which may well have arisen from forgetfulness, and was evidently a mistake. *Worthington* v. *Hylyer*, 4 Mass. 196. *Bott* v. *Burnell*, 11 Mass. 163. *Melvin* v. *Proprietors of Locks & Canals*, 5 Met. 15. *Hastings* v. *Hastings*, 110 Mass. 280. Moreover, the statement that his interest is three fifths purports to be made as a statement of all his interest, and there are no words which indicate *per se* any intention to convey less than his whole interest. The references to the two deeds are evidently made for the purpose of describing the property, and not the amount of interest or the quantity of the estate conveyed.

We do not think that the notice given by Somes to the plaintiff in any way affects, or impairs, or clouds the plaintiff's title, and according to the terms of the report the entry must be,

Judgment for the defendant.

BANK OF NORTH AMERICA *vs.* FREDERICK H. RINDGE.

Suffolk. March 11, 1891. — June 27, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Kansas Corporation — California Stockholders — Enforcement of Personal Liability.

A resident of New York cannot maintain an action in the courts of this State against a resident of California, to establish the personal liability of the latter as a stockholder for the debt of a corporation having no place of business in this State, and organized under laws of Kansas providing for a special and limited liability on the part of a stockholder, when no judicial proceedings have been taken in that State to ascertain and establish the liability of the defendant as such stockholder.

CONTRACT, seeking to hold the defendant responsible on a judgment recovered in Kansas against the Haddam State Bank, a Kansas corporation, in which the defendant was a stockholder. The Superior Court sustained a demurrer filed by the defendant, on the ground that the declaration did not set forth a legal cause of action; and the plaintiff appealed to this court. The facts appear in the opinion.

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H. S. Dewey, for the plaintiff.

H. Wheeler, for the defendant.

ALLEN, J. The plaintiff is a corporation of the State of New York. The defendant is a resident of California, who owned fifty shares of stock in the Haddam State Bank, a corporation of Kansas. The plaintiff recovered judgment in Kansas for $5,343 and costs against the Haddam State Bank, and took out execution thereon, but could find no property of the bank whereon to levy, and so the execution was returned unsatisfied. No steps were taken in Kansas to charge the defendant as a stockholder in the bank, but, he being found in Massachusetts, the plaintiff brings this action against him here, seeking to charge him personally for the judgment against the bank to the amount of the par value of his shares therein, namely, $5,000. This is sought to be done by virtue of the laws of Kansas, respecting which the averment in the declaration is as follows:

"And the plaintiff further says, that by the laws of the State of Kansas, if any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, and such plaintiff may maintain an action at law against any one or more of the stockholders of such corporation to recover a debt due by the corporation."

The declaration was demurred to, and we have to determine whether the plaintiff states a case upon his declaration.

The declaration does not in terms set forth any statute of Kansas, nor show to what extent the laws of Kansas above set forth are statutory, or rest merely in judicial decisions. It is to be regretted that we are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the courts of that State. But we must take the case as the parties present it to us.

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The question can hardly be considered as an open one in this Commonwealth. This court has often declined to exercise jurisdiction to enforce a liability imposed upon stockholders in corporations established in other States under statutes of those States. In *Post & Co.* v. *Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341, 345, it is said: "This court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws, but because it is a suit against a foreign corporation which involves the relation between it and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created." See also *New Haven Horse Nail Co.* v. *Linden Spring Co.* 142 Mass. 349, 353, and cases cited.

The case at bar furnishes a strong illustration of the propriety of this course. If the plaintiff, as a creditor of the Kansas corporation, without obtaining any previous judgment in Kansas establishing the defendant's liability as a stockholder, can maintain an action directly and in the first instance against him in Massachusetts, for the purpose of charging him as a stockholder under the qualified liability set forth in the declaration, then it would follow that the plaintiff might also institute a similar action against him in California, or in any number of other States where service upon him could be obtained. The plaintiff might also institute similar actions for the same debt in different States against other stockholders. In such case, it is probable that a judgment against one stockholder without satisfaction would be no bar to actions against others, but it is obvious that the defendants in such actions might be put to great inconvenience in ascertaining, and indeed might find it practically impossible to ascertain, what steps the plaintiff might have taken against other stockholders in other States. A dishonest creditor might possibly recover several times over against different stockholders in different States, before they respectively could ascertain the facts. Likewise, the defendant, if compelled to pay under a judgment recovered in one State, would find it difficult, if not impossible, to enforce contribution from other stockholders residing elsewhere. Moreover, if the plaintiff might maintain such actions against the defendant and against other stockholders in different States, until he should finally recover satisfaction, other creditors of the

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Kansas corporation might also do the same. If every creditor of a Kansas corporation, which has no property with which to respond to a judgment obtained by such creditor against it in Kansas, may thereupon, without any further proceedings in that State to charge the stockholders, maintain an action against every stockholder in every State in the Union where service can be obtained, and pursue such action until satisfaction is obtained from some stockholder in some State, it is obvious that a large amount of litigation might ensue, under which substantial justice as among the stockholders could not be worked out. The liability of the stockholder, as set forth in the declaration, is not a general liability for all the debts of the corporation. The execution against the stockholder which can be issued in Kansas in the action against the corporation, as set forth in the declaration, is only "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon." Probably, by the true construction of the laws of Kansas, the action at law to charge stockholders, which is given as an alternative remedy, would be limited to the same amount as the execution; though, according to the averment of the declaration, the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, without any other limitation being expressed. The present plaintiff does not contend that it can recover against the defendant the full amount of its judgment, but only the par value of the defendant's stock in the bank. The liability sought to be enforced is a strictly limited one. It seems to us that a *bona fide* or at any rate a compulsory payment to one creditor would discharge a stockholder to that extent from liability to others; and a payment of the full par value of his stock would, according to the view which has been expressed by this court, be a full discharge; *Halsey* v. *McLean*, 12 Allen, 438, 442; though as to this other courts might hold otherwise. *Fowler* v. *Robinson*, 31 Maine, 189. *Grose* v. *Hilt*, 36 Maine, 22. There is no averment in the declaration that the defendant has not been thus discharged from liability, and perhaps this is not necessary, as it would be more properly a matter of defence; but in case of several actions in different States, questions of priority of the claims of creditors might arise, upon which the decisions of the courts of the different States might not be uniform, and thus the de-

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fendant might be held liable more than once. The cases cited by the defendant appear to show that in some States the creditor first bringing suit has priority. *Ingalls* v. *Cole*, 47 Maine, 530. *Thebus* v. *Smiley*, 110 Ill. 316. In Missouri, the creditors rank in the order in which they respectively obtained judgment. *State Savings Association* v. *Kellogg*, 63 Misso. 540. In other States, no priority among the creditors is recognized. *Pfohl* v. *Simpson*, 74 N. Y. 137. *Wright* v. *McCormack*, 17 Ohio St. 86. *Eames* v. *Doris*, 102 Ill. 350. *Chicago* v. *Hall*, 103 Ill. 342. See Thompson, Liability of Stockholders, §§ 420–426; 2 Morawetz, Corp. (2d ed.) § 897. Even a compulsory payment might not avail to protect him. Moreover, the defendant might by way of set-off present claims which he holds either against the corporation in Kansas, or against the creditor who sues him, and different decisions in respect to his right of set-off might be made in different States.

These considerations are suggested to illustrate the practical difficulty of enforcing a liability such as that set forth in the declaration in other States than that where the corporation is established, in such a way as to secure substantial justice. This difficulty is far greater in cases where no steps have been taken in the State where the corporation is established to ascertain and determine the amount of each stockholder's liability. There the whole amount of debts can be ascertained, and the proper proportion assessed upon each stockholder; or his liability can be otherwise determined in a manner which will avoid many of the objections which exist against the maintenance of actions like the present. We remain satisfied with the conclusions heretofore reached by this court, that such an action under the circumstances which appear here ought not to be entertained in this State. Limiting our decision to the facts now before us, it is this: That a resident of the State of New York cannot maintain in the courts of this State an action against a resident of the State of California, to establish his personal liability as a stockholder of a corporation organized in the State of Kansas, and having no place of business in this State, for a debt of that corporation to the plaintiff, under laws of Kansas such as are set forth in the declaration, providing for a certain special and limited liability on the part of stockholders, when no judicial

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proceedings have been taken in Kansas to ascertain and establish the liability of the defendant as such stockholder.

Whether the same result might not be reached on the ground that the subsidiary liability of stockholders such as is set forth is matter of remedy only, and does not follow the stockholder outside of the State, there being no averment of a different construction of the statute by the Kansas courts, we need not consider. *Brown* v. *Eastern Slate Co.* 134 Mass. 590.

Judgment for the defendant affirmed.

ALDEN T. KEEN *vs.* JEREMIAH SHEEHAN.

Middlesex. March 13, 1891. — June 27, 1891.

Present: FIELD, C. J., HOLMES, MORTON, & LATHROP, JJ.

Tax — Sale by Collector — Lien.

If land is advertised for sale at the same time in the same newspaper by the same collector for the taxes of two successive years, and at the time and place appointed is sold by him to one for the tax of the earlier year, and later at the same sale to another for the tax of the year following, the second sale is valid, and the purchaser thereat is entitled to the land.

WRIT OF ENTRY, to recover a parcel of land in Cambridge. The case was submitted to the Superior Court, and, after judgment for the demandant, to this court on appeal, on agreed facts, which, so far as material to the point decided, appear in the opinion.

S. H. Dudley, for the tenant.

J. M. Hall, for the demandant.

HOLMES, J. This is a writ of entry, brought by one purchaser at a tax-sale against another. The land was advertised at the same time in the same newspaper by the same collector for the taxes of 1880 and of 1881. At the time and place appointed it was sold to the tenant for the taxes of 1880, and later at the same sale it was sold to the demandant for the taxes of 1881. The deed to the demandant is dated a day later than the deed to the tenant.

The only question intended to be raised is whether land can

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be sold thus successively, at the same time and place, by the same collector, for the taxes of different years. We see no objection to such a course sufficient to warrant our declaring the demandant's title void. The tax for each year is a debt; *Felker* v. *Standard Yarn Co.* 148 Mass. 226; *Richardson* v. *Boston*, 148 Mass. 508; and a distinct debt. The lien for each year is shown to be distinct by the nature of the debt which it secures, and by the distinct time for which it lasts. Pub. Sts. c. 12, § 24. There is no doubt that a sale after the 1st of May for taxes of a previous year does not prevent a subsequent sale for the taxes due as of the 1st of May. *O'Day* v. *Bowker*, 143 Mass. 59. The first sale conveys a good title, subject to the right of redemption and subject to the later and paramount lien. For the lien of each year's tax is paramount to all previous liens. *Langley* v. *Chapin*, 134 Mass. 82. *Anderson* v. *Rider*, 46 Cal. 134. *Wass* v. *Smith*, 34 Minn. 304. *McFadden* v. *Goff*, 32 Kan. 415, 418.

There is nothing in the statutes to overcome these general considerations. The plural used in the direction to the collector, in the Pub. Sts. c. 12, § 35, to sell so much, etc., "as shall be sufficient to discharge the taxes," is satisfied if interpreted as referring to the "taxes" mentioned in § 24 as constituting a lien. Nothing is less likely than that it was used in contemplation of a sale for the taxes of different years at the same time. The provision in § 38, that the collector's deed shall convey all the right and interest which the owner had therein, etc., was inserted *alio intuitu*, and does not affect the lien for taxes. See *Langley* v. *Chapin*, 134 Mass. 82, 88.

If the sale for the tax of 1880 had been made by a different collector, on an earlier day and at a different place from the sale for the tax of 1881, we doubt if it would have occurred to any one to deny the validity of the subsequent sale on the ground that the tax for 1881 was due when the former sale took place. The fact that the two sales were made by the same man at the same place and on the same day does not seem to us to make any change in their effect. The cases cited for the tenant seem to have turned on the language of the statutes under which they arose. *Hough* v. *Easley*, 47 Iowa, 330. *State* v. *Helmer*, 10 Neb. 25.

Judgment for the demandant.

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MALON E. BRANDE & another *vs.* JAMES J. GRACE & another.

Suffolk. March 20, 23, 1891. — June 27, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Landlord and Tenant — Lease — Implied Grant — Mandatory Injunction — Damages.

A sublease of premises for business purposes was of front rooms, "with all the rights and privileges thereto belonging," situated in the second story of a building set back a few feet from the line of a city street, the land between the building and the street being used as a part of the sidewalk, but never dedicated to the public. A subsequent lessee of the entire premises for a number of years proposed to alter the building by extending the side walls to the street line and erecting a new front wall, so as to enclose the original front rooms and to interpose another room between them and the street; and the sublessee sought in equity to prevent the same. An injunction was refused at the hearing, and the lessee made the alterations, completing them a few months before the sublease would expire. *Held*, that the alterations were inconsistent with the sublessee's rights under his lease. *Held, also*, that, under the circumstances, no injunction should issue, but that the sublessee's remedy should be confined to damages.

BILL IN EQUITY, filed in the Superior Court on August 30, 1890, against James J. Grace and the American Protective League, to prevent the defendants from altering a building. The case was heard by *Mason*, J., and reported for the determination of this court, and was as follows.

The plaintiffs composed the firm of Brande and Soule, dentists; and the defendant Grace was the lessee of premises numbered 181 Tremont Street, in Boston, which included a six-story building set back from twelve to fourteen feet from the sidewalk of that street. The unoccupied land between the building and the street was included in his lease, and was used as a part of the sidewalk, but had never been dedicated to the public. On or about February 1, 1888, Grace executed a sublease, with a covenant therein for quiet enjoyment of a portion of the building, described as "the rooms numbered 1, 2, 3, and 4, located on the second floor of building numbered 181, and located on Tremont Street in said Boston, with all the rights and privileges thereto belonging, . . . from the first day of March, A. D. 1888, during the following term of four years (4) thence next ensuing, expir-

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ing February 29, A. D. 1892." These rooms included the front rooms on that story, and from them an uninterrupted outlook was to be had into the street. The plaintiffs, who were already in occupation of the rooms as tenants of Grace, continued thenceforward to occupy the rooms, and to do a profitable business in dentistry there, and allowed their signs attached to the outside face of the front wall to remain there. Subsequently Grace sublet the entire premises to the American Protective League for a term of years, which corporation proceeded to alter the building by taking down the original front wall thereof, and by extending its side walls to the street line and erecting a new front wall to the entire height of the building, so as to enclose the rooms leased and occupied by the plaintiffs, and to interpose another room between them and the street. This bill was then brought by the plaintiffs to prevent such alterations from being made, and a temporary injunction was issued to prevent the defendants from taking down so much of the original front wall as enclosed the second story of the building. The plaintiffs then discontinued as to Grace, and filed a supplementary bill praying that the defendant corporation might be prevented from making its proposed alterations. At the hearing, the judge made a final decree that the injunction already issued should be continued to the end of the plaintiffs' tenancy, but ruled that the plaintiffs had acquired no right to the light and air which would be obstructed by the other proposed alterations, and refused an injunction to prevent the same. The defendant corporation thereupon proceeded to erect, and had completed the new front wall, and had extended the side walls of the building so as to unite with the same, thus cutting off the light and air from the plaintiffs' front rooms, and covering up their business signs upon the external surface of the original front wall.

A. Russ, (*D. A. Dorr* with him,) for the plaintiffs.

R. M. Morse, Jr., (*J. M. Olmstead* with him,) for the defendant corporation.

ALLEN, J. The determination of this case depends upon the proper application of rules of law, which of themselves are simple. "The grant of anything carries an implication, that the grantee shall have all that is necessary to the enjoyment of the grant, so far as the grantor has power to give it." *Salisbury*

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v. *Andrews*, 19 Pick. 250, 255. And in order to determine what is thus granted by implication, the existing circumstances, and the actual condition and situation of that which is granted, may be looked at. *Salisbury* v. *Andrews*, 19 Pick. 250, 255.

The premises leased to the plaintiffs were described as "the rooms numbered 1, 2, 3, and 4, located on the second floor of building numbered 181, and located on Tremont Street in said Boston, with all the rights and privileges thereto belonging." These rooms included all the front rooms in the second story of the building. The building was set back twelve or fourteen feet from the line of the street, and the space between the building and the line of the street had been used as a part of the sidewalk, but never dedicated to the public. The rooms were therefore front rooms, from which the view of the street was unobstructed. The plaintiffs hired the rooms for business purposes. The alterations which the defendants were proceeding to make would have the effect to interpose another room between the leased rooms and the street, and the plaintiffs' rooms would no longer be the front rooms of the building.

Alterations of this character are inconsistent with the rights of the plaintiffs under their lease. It could not have been understood at the time the lease was given that a right to make such alterations was reserved. It is not like the case of the erection of a building, either by a stranger or by the lessor, upon an adjoining lot, which is adapted to have a separate building erected upon it. In this case the lessor, or those holding his title, seek to make such changes in the building itself which contains the leased rooms as will essentially change their character. The subject of the lease is so materially changed that the rooms will no longer answer to the description of them in the lease, when the condition and situation of the premises are also looked at. The lease carries with it an implication that the lessor should not thus proceed to impair the character and value of the leased premises. *Salisbury* v. *Andrews*, 128 Mass. 336. *Doyle* v. *Lord*, 64 N. Y. 432.

We do not regard this view of the rights of the parties as at all inconsistent with the decision in *Keats* v. *Hugo*, 115 Mass. 204, and other cases, which hold or intimate that the necessity must be pretty plain in order to warrant the implication of a

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grant. In this case it is plain that the alterations are inconsistent with the rights of the plaintiffs under their lease.

Under this state of things the defendants might properly have been enjoined from proceeding with their proposed alterations. But the learned justice before whom the case was heard in the Superior Court took a different view of the rights of the parties, relying, it is said, upon *Keats* v. *Hugo*, 115 Mass. 204; and accordingly the plaintiffs' prayer for an injunction was refused. The defendants thereupon proceeded with the work, until now it is completed, so far at least as the external structure of the building is concerned. The lease to the plaintiffs will expire on the last day of February next, and, if the defendants were now ordered to pull down their structure, they might then restore it. The rules under which mandatory injunctions have been issued for such a purpose should not be applied in a case like this. *Attorney General* v. *Algonquin Club*, 153 Mass. 447. It would cause an unnecessary destruction of property. In view of the early termination of the plaintiffs' lease, their remedy should now be confined to compensation in damages, to reimburse them for the injury which they have suffered.

Decree accordingly.

BAXTER NATIONAL BANK *vs.* PETER S. J. TALBOT.

Middlesex. March 24, 1891. — June 27, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Conflict of Laws — Promissory Note — Indorsement — Lex Loci Contractus.

If a promissory note is indorsed in another State, according to the laws of which the contract of indorsement is not an absolute one, but the liability of the indorser, as between himself and any party taking the note with notice, is dependent upon the understanding or agreement of the parties, the *lex loci contractus* will govern in an action brought here against the indorser, and evidence is admissible to prove an oral agreement between the parties to which such indorsement was made subject.

BILL IN EQUITY, filed in the Superior Court, brought by the holder of certain promissory notes to recover against the indorser.

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The case was tried in the Superior Court upon issues for a jury, before *Dunbar*, J., who excluded certain evidence, and ordered the jury to return a verdict for the plaintiff; and the defendant alleged exceptions. The facts and the nature of the evidence appear in the opinion.

F. E. Snow, (*W. A. Gaston* with him,) for the defendant.

M. O. Adams, for the plaintiff.

MORTON, J. The plaintiff seeks to recover in this suit from the defendant as indorser on five promissory notes, and to reach and apply in payment of them the interest of the defendant in a partnership of which he is a member. The notes were made by the Esperanza Marble Company, to its own order, were indorsed in blank by it and the defendant, and by two other parties, and were all made payable at the "Baxter National Bank, Rutland, Vt.," which we assume to be the plaintiff bank. This suit is against the defendant alone. The defendant in his answer alleged that his indorsement was made and took effect as a contract in the State of Vermont, and that by the law of that State his obligation depended, as between the plaintiff and himself, or any other party taking the notes with notice, upon the understanding or agreement between the bank and himself at the time when each indorsement was made in regard to said indorsement. The defendant further alleged that his indorsement was in fact made subject to an oral agreement with the plaintiff, which the defendant has fully performed, that "he was not to be liable thereon except to the amount of any moneys which he might receive upon a certain mortgage upon property in the State of New York." At the trial, the defendant offered testimony tending to prove these allegations. The court received it *de bene*, and at the conclusion of all the testimony ruled that the *lex fori*, and not the *lex loci contractus*, must govern the case; that the oral agreement and the evidence tending to prove it were inadmissible and immaterial, and could not be considered by the jury. The defendant excepted to this ruling, and the question before us is as to its correctness.

The testimony introduced by the defendant tended to show the following, among other facts, in regard to his indorsement of the notes in suit. In January, 1887, the plaintiff bank held overdue notes which it had discounted for the Esperanza Marble Company

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of New York, but which had its usual place of business in Rutland. Part of these notes were indorsed by the defendant. The plaintiff also held a mortgage on certain property in New York as collateral to these notes, but found it inconvenient to attend to its collection, and requested the defendant to attend to it in its behalf; and it was orally agreed between the defendant and the plaintiff that the mortgage should be assigned to the defendant, and that he should collect the same and pay over the proceeds to the bank. It was also orally agreed that the notes held by the bank against the Marble Company should be surrendered to it and new notes given by it therefor, which should be indorsed by the defendant and the other two parties whose names are on the notes in suit, and that the notes should be renewed from time to time as they fell due, the renewals being indorsed by the same parties, until the total amount collectible on the mortgage had been received and paid over by the defendant to the plaintiff bank. It was further orally agreed that the defendant should not be liable on his indorsements beyond the amount which he might receive on account of the mortgage and fail to pay over to the plaintiff, and that he should be held liable on his indorsements only to secure the performance of his agreement to collect and pay over on account of the mortgage. The agreement thus made was carried out. The overdue notes of the Marble Company were surrendered to it, and new notes, indorsed by the defendant and the other parties, were taken in their stead. These have been renewed from time to time, the renewals being indorsed by the same parties, and the notes in suit are renewals of said original notes. The notes have all been made payable at the plaintiff bank in Rutland, and the defendant's indorsement upon all of them was made and took effect as a contract made in Vermont. The mortgage was assigned to the defendant, and he has paid over to the plaintiff bank all the money which he has collected under it.

The jury found by direction of the court that the notes in suit were made payable in the State of Vermont, and that the defendant's indorsement was made and took effect as a contract in that State.

It is apparent that, if the *lex fori* is to govern, the defendant cannot avail himself of the oral agreement entered into

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between the plaintiff and himself. *Adams* v. *Wilson*, 12 Met. 138. *Wright* v. *Morse*, 9 Gray, 337. We do not think, however, that it should govern. It is clear that in all that relates to a contract, to its nature and validity and interpretation, the law of the place where it is made governs. *Carnegie* v. *Morrison*, 2 Met. 381. *Milliken* v. *Pratt*, 125 Mass. 374. *Shoe & Leather National Bank* v. *Wood*, 142 Mass. 563. *Fonseca* v. *Cunard Steamship Co.* 153 Mass. 553. *Nichols* v. *Mase*, 94 N. Y. 160. *Buzzell* v. *Cummings*, 61 Vt. 213. *Forepaugh* v. *Delaware, Lackawanna, & Western Railroad*, 128 Penn. St. 217. *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 453. The law of the place where the contract is made is, without any express assent or agreement of the parties, incorporated into and forms a part of the contract. Contracts are presumed to be made with reference to the law of the place where they are entered into, unless it appears that they were entered into with reference to the law of some other State or country. *Central Bank of Washington* v. *Hume*, 128 U. S. 195, 207. *Chapin* v. *Dobson*, 78 N. Y. 74.

A contract valid in the State or country where it is made will be enforced even in a State or country where it would be invalid, provided it be not there contrary to public policy or morals. *Parsons* v. *Trask*, 7 Gray, 473. *Milliken* v. *Pratt*, 125 Mass. 374. *Fonseca* v. *Cunard Steamship Co.* 153 Mass. 553. *Forepaugh* v. *Delaware, Lackawanna, & Western Railroad*, 128 Penn. St. 217.

On the other hand, it is equally clear that, in all that relates to the procedure for enforcing a contract, the law of the forum controls. *Carnegie* v. *Morrison*, 2 Met. 381. *Hoadley* v. *Northern Transportation Co.* 115 Mass. 304. *Shoe & Leather National Bank* v. *Wood*, 142 Mass. 563. Thus the form in which and the parties by or against whom the action shall be brought, the competency of the evidence offered to establish the alleged cause of action, whether the cause or action is barred by the statutes of limitation, whether a party can maintain an action in his own name or is obliged to use that of another, whether a contract is negotiable, and whether it is to be sued on as a specialty or as a simple contract, with many other similar things, have been held to be matters affecting the remedy, and therefore to be governed by the law of the forum. *Pearsall* v. *Dwight*, 2 Mass. 84. *Orr* v. *Amory*, 11 Mass. 25. *McClees* v. *Burt*, 5 Met. 198.

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Foss v. *Nutting*, 14 Gray, 484. *Richardson* v. *New York Central Railroad*, 98 Mass. 85. *Hoadley* v. *Northern Transportation Co.* 115 Mass. 304. *Leach* v. *Greene*, 116 Mass. 534. *Drake* v. *Rice*, 130 Mass. 410. *Downer* v. *Chesebrough*, 36 Conn. 39. *Leroux* v. *Brown*, 12 C. B. 801. *Stoneman* v. *Erie Railway*, 52 N. Y. 429.

It is sometimes difficult to decide whether the question raised in a given case relates to the nature and validity of the contract, or to the remedy upon it. We think in the present instance it relates to the former, and not to the latter. The defendant contended that under the laws of Vermont his obligation growing out of his indorsements was not an absolute one, but depended, as between the parties, upon the oral agreement or understanding between them, if any, at the time when he placed his name upon the notes. The defendant further contended that, when he placed his name upon the notes, he did so under an oral agreement with the plaintiff bank, by the terms of which his indorsement was only to be regarded as security for the payment by him to the bank of the money that he might collect on the mortgage which was assigned to him.

Assuming, as we must for the purposes of this case, that the law of Vermont was as stated by the defendant, the testimony offered by him bore clearly upon the nature and validity of the contract between himself and the bank. The defendant could not show what the agreement was in any other way than that in which he offered to show it. It was not an attempt on his part to vary a written contract, because, under the law of Vermont, the indorsement did not of itself constitute an absolute contract; but, in order to determine what the contract was, it was necessary to ascertain what agreements or undertakings were entered into at the time, and in connection with and as part of the indorsement. If there were none, then the contract between the plaintiff and the defendant was the usual contract growing out of a blank indorsement. If there were such undertakings or agreements, then they entered into and formed a part of the contract of indorsement. The evidence was rejected, not because it would have been incompetent to prove the facts which it was offered to establish, had the contract been valid in this State, but on the ground that it related to a matter affecting the remedy.

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Back of the question of remedy, however, lies the question of the contract itself, and we think the evidence should have been allowed as bearing upon that. See *Powers* v. *Lynch*, 3 Mass. 77; *Williams* v. *Wade*, 1 Met. 82; *Shoe & Leather National Bank* v. *Wood*, 142 Mass. 563; *Trimbey* v. *Vignier*, 1 Bing. N. C. 151; *Burrows* v. *Jemino*, 2 Strange, 733; *Wattson* v. *Campbell*, 38 N. Y. 153; *Dunn* v. *Welsh*, 62 Ga. 241; *Forepaugh* v. *Delaware, Lackawanna, & Western Railroad*, 128 Penn. St. 217.

The plaintiff objects that there was no issue framed upon the laws of Vermont. But the ruling of the court rendered such an issue immaterial; besides, an issue could at any time have been framed, in the discretion of the court, if satisfied that justice required that it should be done, or the court could hear and pass upon the question itself. *Atlanta Mills* v. *Mason*, 120 Mass. 244.

Exceptions sustained.

ISAIAH D. HUDSON *vs.* INHABITANTS OF MARLBOROUGH.

Middlesex. March 25, 1891. — June 27, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Exceptions — Way — Defect — Absence of Railing.

No exception lies to a refusal to give an instruction requested in terms, if it is given in substance.

In an action by a traveller against a town, for personal injuries occasioned by the absence of a railing at the side of a highway, the presiding judge instructed the jury that the town was under no obligation to fence the way or to put up a railing simply to prevent travellers from straying therefrom; that if a traveller strayed from the highway at a point where there was no railing, and met with an accident at a distance from the way, the town would not be liable; and that the absence of a railing to protect a traveller from dangers in such proximity to the way as to make it unsafe would be a defect for which the town would be liable, but a dangerous place at a distance of twenty-five feet from the limits of the way would not be in such proximity. *Held*, that the plaintiff had no ground of exception.

TORT, for personal injuries occasioned to the plaintiff by reason of the want of a railing at the side of Pleasant Street, a

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highway in the defendant town. At the trial in the Superior Court, before *Thompson*, J., there was evidence that Pleasant Street led from the centre of the defendant town northerly, towards the town of Hudson; that between these points the Berlin Road, so called, diverged from the west side of Pleasant Street; that a triangular-shaped piece of land lying between these ways beyond the point of divergence was rough and stony, and from being level with the roads at that point gradually sloped from Pleasant Street to the Berlin Road as the distance increased between them, forming a bank; that by the side of the Berlin Road was a hollow; that no railing or barrier of any kind existed at the time of the accident upon this piece of land between the two ways; that the plaintiff on the evening of December 9, 1887, which was dark and misty, was driving from the centre of the town along Pleasant Street towards his home on the Berlin Road; that he was on the lookout for the Berlin Road, and as he approached the point of its intersection with Pleasant Street saw a gray line which looked like the travelled part of that road; that he drove upon it, and it turned out to be the triangular piece of land above mentioned; and that his horse passed over the bank into the Berlin Road, and a forward wheel of his wagon went into the hollow beside it, and he was thrown out upon that road, and sustained the injuries complained of.

The plaintiff requested the judge to rule as follows: "In an action against a town to recover damages for an injury alleged to have been occasioned by a defect in a highway, occasioned by the want of a railing or barrier, the town will be liable therefor if such barrier or railing was necessary for the proper security of travellers, and would have prevented the happening of the injury complained of."

The judge refused so to rule, and instructed the jury, among other things, as follows: "It is provided, — and that is a special provision of the statute, — 'if any person suffers bodily injury or damage through a defect, or want of repair or of sufficient railing in or upon a highway, causeway, bridge,' etc., that, under certain conditions, he may recover. So that it makes the railing of certain places in highways reasonable and necessary. But a railing is not for the purpose of preventing a party from straying out of the highway. Towns are not obliged to keep people

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within the road. . . . But the town is obliged to put barriers where they are necessary to make a highway reasonably safe for travellers. . . . It is very important to keep this in mind: that a railing is not to keep travellers in the road but it is for the purpose of making travel on the road, and not in the fields, safe and convenient. Where there is a dangerous place, where there may be a steep bank, or a hole, or a river, that is in such close proximity to the travelled part of the road as to make travel on the road dangerous, then it is the duty of the town to rail such a place. And you can see that there may be cases where a man might trip and fall when exercising ordinary care, and be thrown over a wall, or down an embankment, and you would say that the road was not safe because of the liability of a man who was travelling upon that road to receive such an injury, to fall, or to have such accident happen to him as incident to the travel upon the road. It is necessary to provide against such accidents as that, and to have barriers put up so that a person travelling upon the road shall not be put to such hazard as that, or to those risks and hazards which are incident to travelling upon such a road. . . . It may be a question of fact, or it may be a question of law, whether a place is in such immediate proximity to the travelled part of the way as to make the travel upon the way unsafe. There are cases where it is ruled, as matter of law, that twenty-five feet is so far out of the travelled part of the road as not to require any railing upon the street, or any barrier, to make the way safe and convenient; that is, if a party strayed out twenty-five feet, he was doing it at his own risk. If he gets so far away from the travelled part of the road as that, he takes his chances; that is, that towns are not obliged to protect travellers against liability of that kind. . . . The defect or the failure on the part of the town for which it is undertaken to charge the town, is a failure to put a barrier on Pleasant Street so as to prevent the traveller from getting into the place where this accident is said to have occurred. . . . If you ascertain where the accident was, then you will be able to determine with considerable minuteness and accuracy how far the party was, at the time he received the accident, from Pleasant Street. And that may be an important fact for you to ascertain and determine. If it was out of the way twenty-five feet, I

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rule, as matter of law, that there is not any liability. There is nothing here to show that the town was obliged to rail the road to Berlin at all. It is not with regard to that that complaint is made. I do not know how it would stand any different from what it does if this was not a road where the Berlin Road is. Supposing there was not a road there. Supposing this was a bank in a field which adjoined the road. I do not see how the liability would be any different. The fact that that is a town road, I do not see that that changes it. The town was not bound to rail Berlin Road so that people coming upon Berlin Road through the fields should not receive some damage thereby. But the town is called upon to protect, reasonably, travellers upon the highway by suitable railings where there is a place in such immediate proximity to the travelled part of the way or road as to make the travel upon the road dangerous."

At the close of the charge, the counsel for the plaintiff called the attention of the judge to the last part of his charge, and the judge then said, in substance: "Whether the position of Berlin Road affects the question of the reasonableness of a railing is a question of fact for you to determine. All questions of fact are for the determination of the jury. The court has no right to express any opinion upon questions of fact. As to whether it was necessary for Pleasant Street to be railed at the place where it is claimed it should have been railed, is a question of fact for the jury to determine; and you are to take all the facts into consideration, among which is the position and character of Berlin Road, and the fact of its being a street."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

S. J. Elder & W. N. Davenport, for the plaintiff.

J. W. McDonald, for the defendant.

MORTON, J. The defect alleged in this case was the want of a railing on Pleasant Street on the side next and near to the point of intersection with the Berlin Road. The case was submitted to a jury, and it is apparent that the jury must have found that the want of a railing did not constitute a defect, as that was the main issue on which the case appears to have been tried. The plaintiff complains of the refusal of the court to give the instruction which he requested, and also of certain por-

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tions of the charge which relate to travellers straying from highways, to so much of it as suggested that it might not make any difference to the plaintiff's right to recover that the bank over which he fell was part of the Berlin Road, and to the ruling that the plaintiff could not recover if the place where the accident occurred was more than twenty-five feet from Pleasant Street. Upon a careful examination of the charge, we do not think that either of the plaintiff's exceptions can be sustained.

The ruling requested by the plaintiff was given in substance by the presiding judge. A plaintiff has no ground of exception because the precise words of his request were not used, if it appears that it was given in substance. *Parker* v. *Springfield*, 147 Mass. 391, 393. The charge of the judge was predicated, as a whole, upon the propositions contained in the ruling requested by the plaintiff, which was, that if a railing was necessary for the proper security of travellers, and would have prevented the accident, the want of it constituted a defect which would render the town liable for an injury occurring through its absence. The judge, at considerable length, and by means of various illustrations, called the attention of the jury to cases in which a town would or would not be liable for an accident where there was no railing. We think it was proper for him to do so, and that the jury could not have been misled by anything that was said. He began his charge by saying that the statute makes a railing at certain places and highways reasonable and necessary. Then he went on to say that the railing was to render the road safe and convenient, and not to keep travellers from straying out of it; that a town was not obliged to fence its highways so as to keep travellers from straying beyond their limits, and their liability to get out of a road did not constitute a defect; but that a town was obliged to put barriers where they were necessary to make the highway reasonably safe for travellers, and if there was any dangerous place in such proximity to the road as to make travel upon that road unsafe, then the town was obliged to put up railings or barriers to protect travellers against those places; and this last statement was repeated in substance at the close of the charge. The different propositions were illustrated in a variety of ways, but we think the purport of the whole was, and that the jury must have so understood it, that the town was under no

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obligation to fence its roads or put up barriers simply to prevent travellers from straying from the highway, and that if a traveller strayed from a highway where there was no barrier into an adjoining field, or on to adjoining premises, and met with an accident at some distance from the highway, the town would not be liable, and the failure to have a barrier at the point where the traveller left the highway would not constitute a defect in the highway; but if there was a dangerous place, a bank, hole, or anything else, in such proximity to the road as to render the road unsafe for travellers without a railing or barrier at that place, then if an accident occurred to a traveller at such place through want of a sufficient railing or barrier, the want of the railing or barrier would constitute a defect for which the town neglecting to put up the barrier or railing would be liable. So understood, the instructions were clearly not open to exception.

The suggestion in the charge, that it might not make any difference to the right of the plaintiff to recover that the bank over which he fell was part of the Berlin Road, was afterwards modified by the presiding judge, upon his attention being called to it, in such a way that the plaintiff could not have been prejudiced by the suggestion as originally made, even assuming that it was, as first made, harmful to him. The jury were then distinctly told that whether the position of the Berlin Road affected the question of the reasonableness of a railing was a question of fact for them, and that, in considering whether it was necessary to rail Pleasant Street at the place where it was contended that it should have been railed, they were to take all the facts into consideration, among which were the position and character of the Berlin Road.

The ruling that, if the place where the accident occurred was twenty-five feet from Pleasant Street, the town would not be liable, was clearly correct. In such a case as that, the place where the accident occurred would not, as matter of law, be in such immediate proximity to the road as to require the town to put up a railing in order to make the road safe and convenient for travellers. *Murphy* v. *Gloucester*, 105 Mass. 470. *Warner* v. *Holyoke*, 112 Mass. 362. *Puffer* v. *Orange*, 122 Mass. 389. *Daily* v. *Worcester*, 131 Mass. 452. *Barnes* v. *Chicopee*, 138 Mass. 67. *Exceptions overruled.*

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DAVID DAVIS *vs.* INHABITANTS OF BARNSTABLE & others.

Barnstable. March 26, 1891. — June 27, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Public Charity — Devise to Town for Schools — Bill for Instructions by Town Agent.

A gift to a town by will of a fund, the income of which is to be applied forever under its direction "to the support of public schools in said town, in such way as the town shall judge best," the testator expressing the wish, however, that "it be applied to providing school books for the public schools, unless it shall appear to the town that it can be applied in some more profitable and beneficial way," is a gift for a charitable use which the town may properly take.

An agent, chosen by a town in accordance with the terms of a gift by will to the town, who is to take charge of the fund, and is to invest it in no other way than by lending it to the town, taking the notes of its treasurer therefor, has sufficient title to the fund to bring, upon the request of the town, a bill in equity for instructions, to which all those interested are made parties, as to the proper disposition of the income of the fund.

A testator by his will, after providing for his nearest of kin and those dependent upon him, and expressing a wish to dispose of the residue of his estate in some manner for the benefit of his native town and its inhabitants, devised such residue to the town in trust, the income to be forever applied, under the direction of the town, "to the support of public schools in said town, in such way as the town shall judge best, but my wish is that it be applied to providing school books for the public schools, unless it shall appear to the town that it can be applied in some more profitable and beneficial way." *Held*, that the town could not devote the income to purchasing and presenting to scholars, attending its public schools from year to year, the books which they were using in their studies at the time they left school, or during the last year of their school attendance.

BILL IN EQUITY, for instructions as to the disposition of the income of a trust fund given by the will of Enoch T. Cobb. *Knowlton*, J. reserved the case for the consideration of the full court. The facts appear in the opinion.

H. M. Knowlton, for the town of Barnstable.

J. M. Day & T. C. Day, for the school committee of the town.

MORTON, J. There can be no question that the gift in this case is for a charitable use, and that the town may properly take it. The fund is given for the benefit of the town of Barnstable, and the income is to be "applied, under the direction of the town

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of Barnstable, to the support of public schools in said town, in such way as the town shall judge best." The testator desires that the income shall "be applied to providing school books for the public schools, unless it shall appear to the town that it can be applied in some more profitable and beneficial way." The purpose of the gift is to promote public education, and the gift clearly constitutes a public charity. *Drury* v. *Natick*, 10 Allen, 169. *Cary Library* v. *Bliss*, 151 Mass. 364.

The plaintiff has charge and possession of the fund under the will, and by the vote of and as agent for the town. The will provides that upon the death of the testator's wife, should she survive him, all that then remains of his estate, real and personal, shall go to the town of Barnstable in trust for certain purposes, and be held and managed as therein provided. As soon as may be after the estate comes to it, the town is to choose an agent who shall take charge of the estate. He is to give bond to the town, with sufficient sureties, to the satisfaction of the selectmen, in a sum not less than the amount of the estate. He is also directed to sell at public auction all the testator's real and personal estate, with two exceptions, and is authorized to give deeds conveying the real estate, and he is not to invest the fund in any other way than by lending it to the town of Barnstable, and taking the notes of the treasurer therefor.

The plaintiff is the successor of the agent originally appointed, and was chosen to fill the vacancy occasioned by his death. The town has appointed a committee to take measures to have the question that has been raised settled by this court, and this committee has also requested the plaintiff to bring this bill. All the parties interested are before the court. The Attorney General has been notified, and has intimated that he does not care to be heard. While the court cannot acquire jurisdiction by consent of parties, we think, without passing upon the exact nature of the plaintiff's title to the fund, that he has sufficient title to it to justify him in coming to this court for the instructions which he seeks. *Cobb* v. *Rice*, 130 Mass. 231. *Stone* v. *Reed*, 152 Mass. 179.

The question is whether the town can devote the income to purchasing and presenting to the scholars who attend its public schools from year to year the books which they were using or

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studying at the time of their leaving school, or during the last year of their school attendance. It is no doubt true, as claimed by counsel for the town, that, in a broad sense, this might tend to promote education in the town of Barnstable through the medium of its public schools. But, assuming that the object of the testator was not so much to benefit the tax-payers of the town by lessening the burden of taxation as to afford a means of imparting increased efficiency to its public schools, we think that what the town proposes to do goes beyond the fair scope of the bequest.

The purpose of the testator was to benefit the town and its inhabitants. He says that, having provided for those dependent on him and remembered those nearest of kindred blood, he desires to dispose of what may remain of his estate "in some manner for the benefit of my native town of Barnstable." Again, speaking of his real estate, he says, "As I have no child living to whom I can transmit it, my wish is that it may hereafter benefit the town and its inhabitants." Later in the will he tells how he wishes to benefit the town and its inhabitants. He directs that the income of the fund which he creates "shall forever be applied, under the direction of the town of Barnstable, to the support of public schools in said town, in such way as the town shall judge best, but my wish is that it be applied to purchasing school books for the public schools, unless it shall appear to the town that it can be applied in some more profitable and beneficial way." The evident purpose of the testator was to benefit the town and its inhabitants through its public schools. His own desire was that the income should be used in purchasing school books for the public schools. But he leaves it, after all, to the town to apply it in such way as it judges best. It is to be applied, however, to the benefit of the public schools as schools, not to the benefit of the individual scholars. He nowhere speaks of scholars. The object immediately before his mind, in connection with the idea of benefit to the town and its inhabitants, was the public schools as such. The ultimate good aimed at may have been that of the scholar, but as a scholar in attendance on the public schools, not after the scholar's connection with them had ceased. And we can but think that this view would in the end be more productive of good than

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would be the case if the town were allowed to use the income according to the scheme proposed in its vote.

The town is vested with a large discretion, it is true, as to the manner in which the income shall be applied, but it clearly has no right to apply it in a manner and to purposes not fairly within the scope of the bequest. *Cary Library* v. *Bliss*, 151 Mass. 364. We are not required to consider whether circumstances might possibly exist which would justify the use of the income in the manner proposed by the town. They do not exist now, and we think that the town cannot lawfully apply the income in the way proposed. *Decree accordingly.*

JESSIE SMITH *vs.* IRA BRADLEY.

Suffolk. March 27, 1891. — June 27, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Deed — Building Restriction — "Equidistant."

Restrictions in a deed, requiring that all buildings erected on the land shall be "placed equidistant from, and at the distance of not less than eight feet back from the street," and "shall have no L more than two stories in height," are not violated by the erection of a building four stories high without an L, the front line or wall of which is placed nine and a half feet back from the street, except a bay window projecting therefrom, which extends out to the eight-foot line.

BILL IN EQUITY, filed in the Superior Court, to enforce the restrictions in a deed. The case was heard by *Dewey*, J., who reported it for the determination of this court, in substance as follows.

The plaintiff was the owner of four lots of land, and the defendant the owner of a single lot, on Westminster Street in Boston, extending back eighty-five feet therefrom, being a part of nine lots situated on that street between Williams Street and Sterling Street. They both derived title from the Tremont Improvement Company, the former owner of the entire nine lots, which conveyed them all by deeds containing the following restrictions: "The premises are sold subject to the restrictions, that the front line of all buildings thereon shall be placed equi-

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distant from, and at the distance of not less than eight feet back from the street; that no building thereon shall be of less width in front than twenty feet; that the main part of such buildings shall be not less than two stories in height, exclusive of the basement and attic; that they shall have no L more than two stories in height; that such buildings shall be of brick, stone, or iron, and shall be used for dwelling-houses solely, or such public buildings as shall be approved by the mayor and aldermen." Each deed also contained a reservation of a right of private passageway over the rear of the lot thereby conveyed. The defendant's lot was upon the corner of Westminster Street and Williams Street. A predecessor in title of the plaintiff, who owned all the other eight lots, built a brick block of eight houses upon them, each two stories high, with a marble front placed eight feet back from Westminster Street. Each house was about forty feet deep and was built without an L, and the land in the rear of each was used as a yard. This block was built upon insecure foundations and the houses settled and moved therefrom irregularly, so as to cause a change in the front line of the houses. One of the plaintiff's houses adjoining the defendant's lot at the front corner nearest that lot was nine and six tenths feet back from the street, and at the farthest front corner nine and twenty-eight one-hundredths feet back from it. Another house of the plaintiff's on the second lot from the defendant's lot was also more than eight feet back from Westminster Street. To the ordinary observer, however, the whole block of houses appeared to be on a line with and equidistant from the street. Prior to the filing of the plaintiff's bill, the defendant had begun to lay the foundation of a building upon his lot, which had previously been unoccupied. He proposed to build a substantial structure of brick, four stories high, including the story in the French roof, fronting upon and having its entrance upon Williams Street, with a bay window on Westminster Street extending from the ground to the top of the building, commencing near the corner at Williams Street. The proposed building was to be constructed without an L, but was to be one building of uniform height, covering substantially the whole of his lot, except eight feet on Westminster Street, and the space of ten feet on the rear end of the lot reserved

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for a passageway. The line of the building, except the bay window, was to be not less than nine and a half feet back from Westminster Street, and substantially the same distance from that street as the front line of the plaintiff's dwelling-house on the adjoining lot. The greatest width of the bay window was to be eleven and a half feet, and its greatest depth one and a half feet, so that no part of the wall of the building, including the bay window, was to be nearer than eight feet to Westminster Street. The building was to be divided into suites or apartments, and was to be occupied as a dwelling-house.

The judge found that the defendant's building, if erected as proposed, would injure the plaintiff's adjacent houses, especially in excluding light and air, by reason of being built so high and extending at the same height over nearly the whole lot.

W. C. Williamson, for the plaintiff.

J. F. Wiggin, for the defendant.

MORTON, J. The defendant does not contend that the premises belonging to him are not subject to the restrictions contained in the original deed given by the Tremont Improvement Company, which originally owned these premises and those adjoining, or that the plaintiff is not a party entitled to relief upon a case being made of an actual or threatened violation of them by the defendant. He insists that the building which he is proposing to erect will not, if erected as he proposes to build it, constitute in any respect a breach of any of those restrictions.

The plaintiff contends that the term "equidistant," in the restriction that "all buildings . . . shall be placed equidistant from, and at the distance of not less than eight feet back from the street," requires the defendant to put the front of his building back to the uniform line of the fronts of the adjoining houses already erected. But it is clear that the line thus fixed must be a line of apparent rather than actual uniformity; and there is nothing in the case to show that the building of the defendant will, if erected as proposed, disturb this apparent uniformity of line. It will be impossible to make the front line or wall of the defendant's building exactly equidistant from the street with that of the other buildings, for these are not equidistant with each other; even the front corners of the plaintiff's own dwelling are not

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equidistant from the street. Moreover, it would be unreasonable, when the other buildings were all intended, as the court has found, to be eight feet back from the street, and are now somewhat more than that distance, through causes due to the imperfect manner in which they were constructed, to require the defendant to conform his building to the accidental line thus established, and which the owners of the other buildings might rectify and would have the right to rectify. It would be giving the other landowners an easement in the land of the defendant in a manner never contemplated by the original deed, and we do not think that the term "equidistant" can be so construed. If it were necessary for us to define it, we would sooner incline to think it was used more in the sense of parallel. It would be highly probable that, under a restriction requiring the front line of buildings to be not less than eight feet from the street, all buildings would be set back eight feet and no more. In that case, if the word equidistant is construed as meaning that all buildings shall be the same distance from the street, it would add no power to the requirement that they should be eight feet back from the street. If, however, it should be construed in the sense of parallel, then, in addition to the uniformity produced by buildings placed the same distance from the street would be the unformity produced by their being placed in a line with the street. Again, if any other line than a line eight feet from the street is to be adopted, how is it to be fixed? We think, therefore, that the defendant has a right to build out to the eight-foot line, and that there is nothing in the proposed construction of his building that will violate this restriction.

The plaintiff further contends, that the restriction which requires that "they [the buildings] shall have no L more than two stories in height," will be violated by the erection of the building intended by the defendant. We do not think that this restriction means that no building shall be erected unless it has an L, or without an L, but that if any building is erected with an L it shall not exceed two stories in height. Parties are left to build with or without an L, as they choose. It is stated in the defendant's brief, that in fact not one of the buildings which have been erected has an L. Parties are also left to build over their entire lots if they choose, leaving

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only the space of eight feet in front and ten feet in the rear, and the only restriction as to the height to which a building may be carried is that which relates to an L. Restrictions of the character of those which we are considering are to be interpreted fairly and reasonably, and according to the apparent purpose of protection or advantage to the several estates which they are intended to secure or promote. *Whitney* v. *Union Railway*, 11 Gray, 359. *Jeffries* v. *Jeffries*, 117 Mass. 184, 189. *Sanborn* v. *Rice*, 129 Mass. 387, 396. While they are not to be narrowly construed, they are not to be unduly enlarged. The original grantor saw fit to insert in the deeds which it gave a restriction that only dwelling-houses should be built on these lots. The court have found that the building which the defendant proposes to erect will be a dwelling-house. It is possible that, if the original grantor had anticipated the erection of a building like that which the defendant is about to put up, it would have inserted in its deeds some restriction to meet it. It is also possible that it did anticipate it, and that the restrictions which the deed contains embody all that the original grantor thought it wise to insert. Taking the deed as it stands, we do not see anything in it which should lead us to the conclusion that the defendant will violate any restriction, express or implied, in regard to the building of an L, in the proposed manner of constructing his building. *Bill dismissed.*

WILLIAM G. PECK *vs.* SAMUEL A. CARLTON.

Middlesex. April 1, 1891. — June 27, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Will — Residuary Clause — "Legal Heirs."

A testator, by the residuary clause of his will, left property in trust, the income to be paid to his wife and to other persons during her life, and provided for the sale and disposition of the same as soon as was expedient after his wife's decease, the proceeds to be paid over to his "legal heirs, in the same proportion as they would have inherited the same in case I had died the survivor of my said wife, and intestate." The testator died before his wife. *Held*, that at her death the residue was to be distributed in the same manner as if he had died intestate immediately after her decease.

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APPEAL from a decree of the Probate Court, upon the petition of William G. Peck, successor of the trustee named in the will of John Boles, for the construction of a residuary clause. The case was heard by *Knowlton*, J., and reserved for the consideration of the full court, and was as follows.

The will was dated September 8, 1886, and, after gifts to the testator's wife, and to his sons, Prescott and Jerome, and to his daughters, Maria E., and Eliza A., wife of Abel G. Peck, contained the following:

"Eighth. All the rest and residue of my said estate and property, real, personal, or mixed, I give, devise, and bequeath unto said Abel G. Peck, but upon trust for the following purposes, to wit: First, to manage the same in a cautious and economical manner, and out of the rents, income, and profits thereof to pay to my said wife during her natural life said annuity as aforesaid, and the balance of said rents, income, and profits, if any, to pay annually as follows, to wit: one fourth thereof to said Prescott Boles, one fourth thereof to said Maria Elizabeth Boles, one fourth thereof in equal parts to said Eliza Ann Peck and her several children, share and share alike, and one fourth thereof in equal parts to said Jerome Boles, Rachel Boles, wife of said Jerome Boles, and their several children, share and share alike. Second, and as soon after the decease of my said wife as expedient, to sell and dispose of all said rest and residue of my said estate and property, real, personal, or mixed, and to pay over the proceeds of such sale and disposition to my legal heirs in the same proportion as they would have inherited the same in case I had died the survivor of my said wife, and intestate."

The testator died on July 1, 1868, and his widow, who survived him, died on July 2, 1889. Before the death of the widow, Maria E., who had married Samuel A. Carlton, and Jerome died, the former without issue and the latter leaving four sons, who were still alive and of full age. Carlton, upon his wife's death, succeeded as her devisee to her interest, if any, under the will of her father, and, from the date of her death to that of the widow, was paid, in common with the heirs of the testator, the share of the income to which his wife was entitled under such residuary clause.

The Probate Court made a decree, "that, by the provisions of

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the second clause of the eighth section of the will of said deceased, the residue of the estate devised and bequeathed by said eighth section did not vest in those persons who would be his legal heirs at the time of his decease, but that those persons take who would have been his heirs if he had survived his wife"; and Carlton appealed therefrom.

The case was submitted on briefs in April, 1891, and afterwards was resubmitted on the same briefs to *Field*, C. J., *Allen*, *Holmes*, *Knowlton*, and *Morton*, JJ.

Samuel Hoar, for the appellant.

S. J. Elder, for the appellees.

KNOWLTON, J. The last part of the eighth clause of the will of John Boles, late of Somerville, deceased, is as follows: "Second, and, as soon after the decease of my said wife as expedient, to sell and dispose of all said rest and residue of my said estate and property, real, personal, or mixed, and to pay over the proceeds of such sale and disposition to my legal heirs, in the same proportion as they would have inherited the same in case I had died the survivor of my said wife, and intestate." The only question in the case is whether, under this clause, the residue of the estate is to go to those persons who were the legal heirs of the testator at the time of his death, or to those who would have been his heirs had he died immediately after the decease of his wife.

The law favors vested rather than contingent remainders, and "the general rule is that, where a will gives a life interest to one, with a devise over, either for life or in fee, to a definite class of persons, the presumption is that those take who constitute the class at the death of the testator, unless the will shows a different intention." *Dorr* v. *Lovering*, 147 Mass. 530, 534. *Merriam* v. *Simonds*, 121 Mass. 198. *Whall* v. *Converse*, 146 Mass. 345. *Cummings* v. *Cummings*, 146 Mass. 501. *Loring* v. *Carnes*, 148 Mass. 223, 225. So strong is the presumption that a reference in a will to the heirs of the testator applies to those who are his heirs at the time of his death, that a different meaning, to be given effect, must plainly appear from other parts of the will. But it is always the duty of the court to discover, if possible, the intention of the testator, and to give it effect. In several recent cases, from general provisions of the will, the

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court has found that the members of a class among whom property was to be distributed were to be determined as of the time of the happening of an event subsequent to the decease of the testator. *Knowlton* v. *Sanderson*, 141 Mass. 323. *Fargo* v. *Miller*, 150 Mass. 225. *Wood* v. *Bullard*, 151 Mass. 324. In each of the last two cases the question was so fully considered, and so many of the authorities were cited and reviewed, that further discussion is unnecessary.

In the present case, the property is to go to the legal heirs of the testator, in the same proportions as they would have inherited it if he had survived until after the death of his wife. On the one hand, it is contended that the words of the will mean that the same persons are to receive the property, and are to receive it in the same proportions, as if the testator had died at that time; on the other hand, that those who are in fact his legal heirs, or their representatives if they are deceased, are to take the property, but that their shares are to be larger than they would be if the widow were to be considered one of the heirs, or, in other words, that this language was chosen merely to show that the widow is not to be included among the "legal heirs" who take the residue. We are of opinion that the former is the true construction. The natural interpretation of the language is that the property is to be distributed as if he had died intestate immediately after the death of his wife. Until her death, the distribution of the residue of the estate is postponed, and the property is kept for the purpose of producing income, which is to be applied according to directions particularly given. After that there is no occasion to do otherwise with it than to distribute it among those who would have been entitled to it if he had died intestate at that time. All of his heirs had been provided for, and had received their shares of the income up to that time. It is hardly to be supposed that he would have used this language to signify that his wife was not to be treated as one of his heirs, first, because in the strict sense of the word, as used in the common law, she would not be considered an heir, although she might be under the later statutes and decisions; and, secondly, because he was speaking of a distribution after her death, and in designating the beneficiaries there was no occasion to refer to her at all. It would have been simple, easy, and natural to

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describe his other heirs in brief general terms, if that had been his only purpose. Unless the words are given the effect contended for by the children and grandchildren of the testator, or are held to have been used merely to exclude the widow, they are meaningless. We are of opinion that they are not used for the latter purpose, and that it does quite plainly appear that the testator intended to have the residue of his estate distributed precisely as if he had died intestate just after the decease of his wife. *Decree of the Probate Court affirmed.*

EMMA MARWEDEL *vs.* EMILY W. COOK & others.

Suffolk. November 14, 1890. — June 29, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Negligence — Owner of Building — Lighting of Stairways — Due Care.

The owner of a building let it for office purposes to various tenants, retaining control of the halls, stairways, and elevator. The stairways were winding, and so constructed that the natural light was partially cut off, and artificial light, for which provision was made, was necessary at times to render them safe. During an afternoon in March a woman went in the elevator to the fifth floor on business, and having finished the same at about half past five o'clock, after the elevator had stopped running for the day, proceeded to descend by the stairway, with which she was unacquainted, then the only mode of egress. A tenant of the office visited by her, seeing that the gas was not lighted, cautioned her to be careful. As she was going down from the fourth to the third story it grew dark, but, although unable to see, she went on, holding to the hand-rail with both hands, and in some way at a turn in the stairs lost her hold, fell, and was injured. *Held*, in an action against the owner of the building for such injuries, that the questions whether the defendant was negligent in not lighting the stairways, and whether the plaintiff exercised due care in descending under the circumstances, were for the jury.

TORT, for personal injuries occasioned to the plaintiff by falling down the stairs of a building in Boston owned by the defendants. Trial in the Superior Court, before *Pitman*, J., who submitted the case to the jury upon the evidence, on the questions of the defendants' negligence and of due care on the part of the plaintiff, and, after a verdict for the plaintiff, the defend-

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ants alleged exceptions. The nature of the evidence appears in the opinion.

The case was argued at the bar in November, 1890, and afterwards, in June, 1891, was submitted on the briefs to all the judges.

L. S. Dabney & H. G. Allen, for the defendants.

H. N. Sheldon, for the plaintiff.

BY THE COURT. The following opinion was prepared by Mr. Justice WILLIAM ALLEN, and after his death was adopted as the opinion of the court by a majority of the Justices.

The defendants let offices in their building, retaining control of the halls, entries, stairways, and elevator, which were not let. The plaintiff, while going down the stairs from an office in the building, fell, and was hurt. There was evidence tending to prove that she fell in consequence of the darkness of the stairway. There was no evidence of negligence by the defendants except in not lighting the stairway, and if they owed to the plaintiff the duty of lighting it, there was evidence of negligence on their part. The general duty which the defendants owed to third persons, in respect to the passages of the building, is well expressed in the instructions to the jury at the trial: "If the defendants leased rooms in the building to different tenants, reserving to themselves the control of the halls, stairways, and elevator, by and through which access was to be had to these rooms, and the general lighting arrangements of those passages, then the defendants were bound to take reasonable care that such approaches were safe and suitable at all times, and for all persons who were lawfully using the premises, and using due care, so far as they ought to have reasonably anticipated such use as involved in and necessarily arising out of the purposes and business for which said rooms were leased."

The plaintiff was using the stairs by the implied invitation of the defendants, and the question of the defendants' negligence turns upon whether it was their duty to persons so using them to provide artificial light at the time the plaintiff fell.

The stairs were constructed in a well, three sides of which were closed. At the back of the well, which was about nine feet from the entrance, or open side, the stairs turned and passed down on the third side of the well to the front or open side.

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The turn was made by six stairs called "winders," which were nearly triangular in form, being about four inches wide on the inside where the hand-rail was, and about two feet wide at the other end against the wall, where there was no rail. There was no skylight to the well, but it received natural light indirectly from a skylight in the elevator well, which was by the side of the stairway, and through glass in the doors of offices. Provision was made for artificial light. The jury may well have found, upon the evidence, that the stairs were unsafe unless lighted, and that the construction of the building and stairway was such as to cut off the natural light, and at times when it was full daylight, and when the stairway was properly in use, to render it unsafe without artificial light, and that the plaintiff, while going down the stairs from the fourth to the third floor, fell at the turn of the stairs at the back of the well in consequence of the stairway not being artificially lighted, and that the stairway was then unsafe for want of such light. There was evidence tending to show that the elevator had ceased running for the day, and the stairway was the only mode of passing from floor to floor of the building; that the use of it for that purpose at the time the plaintiff was injured was intended by the defendants; and that the gas provided by the defendants for lighting the stairway was not then lighted. The jury were justified in finding that the defendants owed to the plaintiff the duty of providing such light as would render the stairway reasonably safe, and that they failed in that duty.

The defendants contended that, if the use of the stairs was dangerous on account of the darkness, the plaintiff was not in the exercise of due care in using them. We think that, under the circumstances, this would not necessarily prevent the jury from finding that the plaintiff was in the exercise of due care. She went up in the elevator to the office on the fifth floor, where she had business, and when she had finished her business there was no way of going down except by the stairs. The evidence tended to show that the first flight of stairs she went down was sufficiently lighted by natural light; that the tenant of the office which she had visited saw that the gas was not lighted, and cautioned her to be careful for that reason; that after she had gone down the stairs from the fifth to the fourth floor, and while

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going down those leading from the fourth to the third floor, it grew dark and she was unable to see, but went on, holding to the hand-rail with both hands; and that in some way at the turn of the stairs she lost her hold and fell. Had the danger been obvious to her before she started, and had there been other ways of egress, there would be great force in the argument. But the evidence tends to show that she was unacquainted with the stairway, and might not have known that there was not as much light all the way down as at the upper flight. It cannot be said, as matter of law, that she was negligent in not going back for assistance when it became dark. That fact called for greater care, and she testified in regard to the care she used. We think it was for the jury to say whether she was negligent in going on under the circumstances, exercising the degree of care in doing so which they may have found upon the evidence that she did exercise. *Exceptions overruled.*

JAMES BURT *vs.* ADVERTISER NEWSPAPER COMPANY.

Suffolk. January 21, 22, 1891. — June 29, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, & MORTON, JJ.

Privileged Communication — Damages — Evidence — Repetitions.

A newspaper may lawfully make fair comments on the conduct of private persons affecting the administration of the custom-house.

Newspaper articles, containing direct and indirect allegations of fact touching a custom-house broker, and highly detrimental to him, charging him with being a party to alleged frauds on the revenue, are not privileged so far as they contain false statements.

A person publishes libellous matter at his peril; and it is no justification that he had reasonable cause to believe it to be true.

The liability for libel is the usual liability in tort for the natural consequences of a manifestly injurious act; the defendant's motives or actual malice, except so far as manifested, are immaterial apart from the Pub. Sts. c. 167, § 80, and possibly from privilege.

In an action for libel contained in a newspaper article charging the plaintiff with frauds on the revenue, the defendant cannot show that the plaintiff's damages are lessened by the previous publication of the charges, unless the article professes on its face to be, and is in fact, based upon them.

In an action for libel contained in a newspaper article charging the plaintiff with

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being connected with frauds upon the revenue, an *ex parte* report upon the same subject, made to the Treasury Department, containing similar charges against the plaintiff, was offered in evidence, coupled with proof that the writer of the articles had this document before him and believed the statements contained therein to be true. The article referred to the report in terms, and stated that certain affidavits contained therein, as well as other affidavits denying them, when marshalled together, made a terrible indictment against the plaintiff, that the later affidavits evidently were intended to shield him, and implied that the public on reading the two sets of affidavits would believe those contained in the report. *Held*, that the report was admissible by reason of the reference to it in the article, and as bearing on the question of damages.

In an action for a libellous publication, charging the plaintiff with being connected with frauds in a certain custom-house, in which one evidence of such fraud is that sugar is valued there lower than in another custom-house, evidence is admissible that the polariscope used in the latter custom-house does not give too high a valuation.

A wrongdoer is not bound to anticipate the general probability of wrongful acts by third persons, e. g. the repetition of a libel, any more than a particular act by this or that individual.

In an action for libel, it is misleading to instruct the jury that "one who publishes a libel is not responsible for the publication of it by others, . . . but he is under obligation to the plaintiff to take into account and into consideration what will be the natural and probable consequences of his act in putting a libel into circulation; to that extent he is responsible, and only to that extent."

TORT, for alleged libels, contained in articles published in January and February, 1889, in successive issues of the Boston Daily Advertiser. The declaration was in four counts. The first article, which was referred to in the first count, and was entitled "A Plague Spot," contained the following: "It is surprising how the New York press has rallied unitedly about the frauds which, at that custom-house, cheat the government out of from ten million dollars to thirty million dollars annually. It is not surprising in the Evening Post, whose close relation with the Burts is understood. One Burt is the broker of the Havemeyer sugar people, and boasts that he makes more than fifty thousand dollars a year in that interest by his influence in securing re-appraisals in the valuations of sugar imported by that great house. The other is Naval Officer of that port, and his long-time connection with some of the most disreputable elements in the New York custom-house has been a matter of public knowledge. . . . The system of frauds has gone so far that claims for damage allowances — that is, reductions in duty for damage suffered by goods in transit — have been all made and ready before the vessel arrived in

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port, and passed, as a matter of course, by accommodating customs officials, at the demands of 'brokers,' who, by a system of 'addition, division, and silence,' have got the appraising department under their control, and made it impossible for importers to do business except through them. . . . Two years of honest administration in New York would restore to our producers the advantage that is sought to be gained for them by the tariff, and which is abated every day by the payment of money by the customs officials in the interest of the foreign manufacturers and their agents in New York City."

The second article, which was referred to in the second count, was entitled "The New York Scandal," and contained the following: "The systematic attempt of the New York papers to belittle and attack the Boston men who have uprooted and shown up the glaring frauds in the New York custom-house would be amusing, if it was not suggestive of things which we will not call by stray names. . . . Now what does this mean? It means that the vilest conspiracy against the laws since the war has been going on in the New York custom-house, and has in part been shown up by Appraiser Stearns, and Special Agent Byrne, of Boston. The corrupt men brought to light are straining every nerve to bedraggle both these men. The newspapers of New York, either by accident or design, fling mud at them. . . . The New York custom-house for years — and we say this on authority — has been the scene of the most corrupt violations of the customs laws the country has ever seen. Men have grown rich in corruption, and in daily open, flagrant violation of the law. This man Burt, the brother of the Naval Officer of the port, as has repeatedly been stated, has brought nearly all the great sugar importers to employ him as a broker, because he has had the entire sugar appraising division under his control. His adherents claim, that after the 4th of March the men who have been discharged for corruption will be returned to office, and that the honest methods which have been established there since Appraiser Stearns went over from Boston will be a thing of the past as soon as a New-Yorker is made Secretary of the Treasury."

The third article, which was referred to in the third count, was entitled "Naval Officer Burt," and, after setting out a letter "To the Editor of the Advertiser" expressing the writer's astonish-

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ment at the paper's reference to that officer, concluded as follows: "The reference to Naval Officer Burt was not intended to reflect on his personal integrity, and was an over strong expression of the regret felt that it is his brother, James Burt, who is involved in the long established and outrageous sugar frauds at that custom-house which are now being brought before the country. Their relationship has undoubtedly been relied upon to help James Burt in his dealings, though Silas Burt may be perfectly innocent of them. It is unfortunate, we say, though not a proof of evil on the part of the Naval Officer, that his brother has for years, undisturbed, carried on the practices which now, when exposed, hold the New York custom-house up as a national disgrace. — Ed. Advertiser."

The last article, referred to in the fourth count, was entitled "Where is the Perjury?" and was as follows: "Is the New York Evening Post crazy or malicious in its attempt to shield and defend the sugar frauds in that city? On Tuesday it printed a lot of affidavits from the discharged employees of the custom-house, in which they deny absolutely the affidavits made by them in Special Agent Byrne's report. When marshalled together, they made a terrible indictment against Broker Burt, brother of Naval Officer Burt. These new affidavits are intended, evidently, to shield Broker Burt. This is a matter worthy of attention. Every one of the affidavits made in Byrne's report was written out either by Special Agent Moore or official stenographer Kerr. Each one, after being written out, was read through and subscribed to by each one of those who now swear that they are false. Either they have committed perjury, or the officers of the hearing, in order to make a case, have taken refuge in forgery. The public will decide for itself which of these ultimations is true. Secretary Fairchild ought to do this at once; then ask the district attorney in New York to indict the parties of one or the other of these two sides. Now that he is after this great fraud, let him show to the New York Evening Post, and also to these men who are so handy with their affidavits, that whichever one of these parties, officials, or discharged employees has resorted to perjury or forgery must go to state's prison. The more this matter is shown up, and especially by the defences printed by the New York Evening Post, the more evident it

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is that the worst nest of rascals in the federal administration has been brought to light. And yet some of the great New York papers see nothing in the matter but cause of contempt, because Appraiser Stearns and Special Agent Byrne went from Boston."

Trial in the Superior Court, before *Dunbar*, J., who, after a verdict for the plaintiff, allowed exceptions, which, so far as material to the points decided, appear in the opinion.

A. Hemenway & H. N. Sheldon, for the defendant.

R. M. Morse, Jr. & F. J. Stimson, for the plaintiff.

HOLMES, J. In this case there must be a new trial. We shall state the grounds on which we come to this conclusion, and shall discuss such of the rulings as dealt with questions which are likely to come up again. Some matters not likely to recur we shall pass over. The first question which we shall consider is raised by the presiding judge's refusal to rule that the articles were privileged. The requests referred to each article as a whole. Each article contained direct and indirect allegations of fact touching the plaintiff, and highly detrimental to him, charging him with being a party to alleged frauds in the New York custom-house. Some or all of these allegations we must take to be false. In our opinion the rulings asked were properly refused.

We agree with the defendant, that the subject was of public interest, and that in connection with the administration of the custom-house the defendant would have a right to make fair comments on the conduct of private persons affecting that administration in the way alleged. But there is an important distinction to be noticed between the so called privilege of fair criticism upon matters of public interest, and the privilege existing in the case, for instance, of answers to inquiries about the character of a servant. In the latter case, a *bona fide* statement not in excess of the occasion is privileged, although it turns out to be false. In the former, what is privileged, if that is the proper term, is criticism, not statement, and however it might be if a person merely quoted or referred to a statement as made by others, and gave it no new sanction, if he takes upon himself in his own person to allege facts otherwise libellous, he will not be privileged if those facts are not true. The reason for the dis-

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tinction lies in the different nature and degree of the exigency and of the damage in the two cases. In these, as in many other instances, the law has to draw a line between conflicting interests, both intrinsically meritorious. When private inquiries are made about a private person, a servant, for example, it is often impossible to answer them properly without stating facts, and those who settled the law thought it more important to preserve a reasonable freedom in giving necessary information than to insure people against occasional unintended injustice, confined as it generally is to one or two persons. But what the interest of private citizens in public matters requires is freedom of discussion rather than of statement. Moreover, the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is much greater than in the other case. If one private citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better, certainly, when he publishes his writing to the world through a newspaper, and the newspaper itself stands no better than the writer. *Sheckell* v. *Jackson*, 10 Cush. 25, 26.

The distinction to which we have referred has been brought out more clearly in England than it has been in our own decisions. Thus, in *Davis* v. *Shepstone*, 11 App. Cas. 187, 190, Lord Herschell says: "It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case the appellants, in the passages which were complained of as libellous, charged the respondent, as now appears without foundation, with having been guilty of specific acts of misconduct and then proceeded on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious; not only so, but they themselves vouched for the statements by asserting that though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their Lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege." *Popham* v. *Pickburn*, 7 H. & N. 891, 898. *Lefroy* v. *Burnside*, 4 L. R. Ir. 556,

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565, 566. *Campbell* v. *Spottiswoode*, 3 B. & S. 769, 779. *Walker* v. *Brogden*, 19 C. B. (N. S.) 65. *Regina* v. *Flowers*, 44 J. P. 377, 378. *Negley* v. *Farrow*, 60 Md. 158. See *Hamilton* v. *Eno*, 81 N. Y. 116; *State* v. *Schmitt*, 20 Vroom, 579, 586; *Eviston* v. *Cramer*, 57 Wis. 570; *Scripps* v. *Foster*, 41 Mich. 742, 746; *Sheckell* v. *Jackson*, 10 Cush. 25, 26.

The foregoing language is applicable to the case at bar. The defendant in all the articles makes statements of fact on its own behalf, and in the second article fairly may be understood to intimate that the private sources of information alleged by the words "we say this on authority," apply not merely to the existence of corruption in the New York custom-house, but to the plaintiff's connection with it. The articles published by the defendant, so far as they contained false statements, were not privileged. We should add, however, with reference to another trial, that there was evidence that some of the charges in the articles were true, and so far as the jury might find them to be so, inasmuch as the matter under discussion was a matter of public concern, the defendant would be justified not only in making those charges, but in free and open comment and criticism in regard to them.

The next question, the first which is raised by the bill of exceptions, is whether the court below rightly excluded a letter from the Secretary of the Treasury of the United States, and an *ex parte* report on the same subject made to the Treasury Department, containing similar charges against the plaintiff, coupled with evidence that the writer of the articles had these documents before him, and believed the statements contained in them. The evidence was offered to show that the defendant acted in good faith, and, as it is commonly said, to negative express malice, in support of its plea of privilege; also as bearing on damages, and generally for any purpose for which it might be admissible.

We already have considered how the defendant stands in respect of privilege. It is said that the report tended to prove that the defendant had reasonable cause to believe the charges to be true, and that it tended to show that the plaintiff was less damaged than he otherwise would have been by reason of the fact that similar charges had been made and published before.

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As to the former of these suggestions, it is enough to say that it is not a justification that the defendant had reasonable cause to believe its charges to be true. A person publishes libellous matter at his peril. *Watson* v. *Moore*, 2 Cush. 133, 140. *Parkhurst* v. *Ketchum*, 6 Allen, 406. *Clark* v. *Brown*, 116 Mass. 504, 507.

Then as to damages. The damages recovered are measured in all cases by the injury caused. Vindictive or punitive damages are never allowed in this State. Therefore, any amount of malevolence on the defendant's part in and of itself would not enhance the amount the plaintiff recovered by a penny, and reasonable cause to believe the charges or absolute good will would not cut it down. *Watson* v. *Moore*, 2 Cush. 133. *Parkhurst* v. *Ketchum*, 6 Allen, 406. *Clark* v. *Brown*, 116 Mass. 504. Apart from the statute, (Pub. Sts. c. 167, § 80,) and possibly from privilege, the defendant's motives and intent are totally immaterial. Its liability is the usual liability in tort for the natural consequences of a manifestly injurious act. No doubt there might be cases, especially of slander, where it is impossible photographically and phonographically to reproduce the overt act complained of, where the defendant's motive would afford an inference as to the character of the act and the impression made by it. No doubt a manifestation of malevolent motives might enhance damages under our rule allowing damages for injured feelings. *Mahoney* v. *Belford*, 132 Mass. 393, 394. *Hastings* v. *Stetson*, 130 Mass. 76, 78. *Markham* v. *Russell*, 12 Allen, 573. See *Ford* v. *Ford*, 143 Mass. 577, 579; *Leonard* v. *Allen*, 11 Cush. 241. But there is nothing of that sort in this case. *Watson* v. *Moore*, 2 Cush. 133, 140. *Clark* v. *Munsell*, 6 Met. 373, 388.

As a general proposition, the defendant cannot show that the plaintiff's damages are less than they otherwise would have been because the charge has been made and published before. *Mahoney* v. *Belford*, 132 Mass. 393. *Peterson* v. *Morgan*, 116 Mass. 350, and cases cited. *Alderman* v. *French*, 1 Pick. 1, 18. See *Scott* v. *Sampson*, 8 Q. B. D. 491; *Hatfield* v. *Lasher*, 81 N. Y. 246, 249, 250. But with reference to what we shall have to say concerning the fourth count, it should be added that probably a different rule would apply if the defendant's publication pro-

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fesses on its face to be based upon other publications which are referred to, and the fact is so.

The last ground on which it was argued that the report should have been admitted was that it was made a part of the libel by reference. We are of opinion that the articles, with the exception of that set out in the fourth count, do not refer to the report in such a way as manifestly on their face to need the report in order to explain them. The report was laid before us by agreement of counsel. It is a very long document, which it would have been useless to read through to the jury, and, from such inspection as we have been able to make, does not in any way explain, qualify, or mitigate the expressions used by the defendant. On the contrary, its only effect could be to raise either a belief or a strong suspicion that the defendant's charges were true. For that purpose it was of course incompetent, and therefore as a practical matter the only effect of allowing it to go in would have been an injustice to the plaintiff. But the article set out in the fourth count stands somewhat differently from the others. This refers to the report in terms, and then proceeds to say that the affidavits in the report and the later affidavits denying the former, when marshalled together, make a terrible indictment against the plaintiff, — that the new affidavits evidently are intended to shield him, — and implies that the public, on reading the two sets, will believe the former. The jury, if they should compare the documents, might agree with the inferences of the defendant, and to that extent might find the allegations of the article to be true. Under this count alone the report should have been admitted, for the above reason, and with reference to the damages, as we have stated earlier.

Another exception is to the exclusion of evidence that the polariscope used in the Boston custom-house did not give too high a valuation. One evidence of fraud in the New York custom-house was that sugar was valued lower there than in Boston. The plaintiff admitted the fact, and gave as one reason for it that the Boston examiner overestimated the quartz plate by which he tested his instrument. He gave this reason when attempting to secure the removal of the Boston examiner from New York, after the latter had been sent there to reform the alleged New York practices. The evidence offered tended to

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prove the existence of the fraud, and perhaps that the plaintiff knew of its existence, and should have been admitted.

The court was asked to rule that the plaintiff could not recover for repetitions of the defendant's libels by others, and several other rulings tending in the same direction were asked. The court instructed the jury as follows: "One who publishes a libel is not responsible for the publication of it by others; that is to say, he is not responsible for the injurious act of another. But there is a general principle which runs through all tort cases, which is generally stated in this way: that a man is presumed to intend the natural and probable consequences of his acts, and that request for instruction therefore should be qualified in that way. He is not responsible for the injurious acts of another in publishing, but he is under obligation to the plaintiff to take into account and into consideration what will be the natural and probable consequences of his act in putting a libel into circulation. To that extent he is responsible, and only to that extent." The general proposition laid down is correct, no doubt, if rightly understood, and it was applied to libel, under what circumstances and with what meaning does not appear, in *Miller* v. *Butler*, 6 Cush. 71. But if applied to libel or slander without further explanation, it is likely to be misleading, and when put as a qualification of the ruling asked hardly can fail to be so. The meaning which naturally would be conveyed to the jury is, that, although a particular republication cannot be recovered for, damages may be enhanced by the general probability of unlawful republications. This is not the law. Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual. *Hastings* v. *Stetson*, 126 Mass. 329, 331. *Shurtleff* v. *Parker*, 130 Mass. 293, 296. *Hayes* v. *Hyde Park*, 153 Mass. 514. *Leonard* v. *Allen*, 11 Cush. 241, 246.

Exceptions sustained.

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JOSEPH CARBURY *vs.* JOHN R. DOWNING.

Suffolk. January 22, 23, 1891. — June 29, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, & MORTON, JJ.

Personal Injuries — Employers' Liability Act — Negligence.

In an action under the St. of 1887, c. 270, § 1, cl. 1, for personal injuries to an employee engaged in storing ice occasioned by the alleged neglect of the employer to provide suitable hoisting appliances, there was evidence that the cakes of ice were hoisted up a steep incline from the top of which a run led into the ice-house; that a rope, passing around a drum on the engine and through a gin-wheel at the top of the incline, ended in a loop to which were attached the ice tongs; that in hoisting, the rope wound around the drum until the ice reached the top of the incline, when it was stopped by stopping the engine; that the gin-wheel was so situated that when the ice reached the top of the incline it swung over into the run; that the plaintiff was employed to guide the ice from the top of the incline to the run, and to unhook the tongs from the ice and pull them back; that at the time of the accident, when a cake of ice reached the top of the incline, the plaintiff took hold of the loop to guide the ice on to the run; that, the rope not being stopped, his hand was drawn therewith into the gin-wheel, which was a few inches above his head and within his reach; that a wire run through the rope, with its ends twisted together to serve as a mark, was the only means by which the engineer was notified to stop the engine; that this wire had not moved from its place; and that the engineer, instead of stopping the engine when the ice reached the top, "went a few inches farther" for this cake of ice because it was larger than usual. *Held*, that the plaintiff was not entitled to go to the jury.

TORT, under the St. of 1887, c. 270, § 1, cl. 1, to recover for personal injuries occasioned to the plaintiff while engaged in hoisting ice in the defendant's employment. Trial in the Superior Court, before *Staples*, J., who refused to rule, as requested by the defendant, that there was no evidence to warrant the jury in finding for the plaintiff; and, after a verdict for the plaintiff, the defendant alleged exceptions. The nature of the evidence appears in the opinion.

J. Lowell, Jr., (*S. H. Smith* with him,) for the defendant.

L. M. Child, for the plaintiff.

By THE COURT. The following opinion was prepared by Mr. Justice WILLIAM ALLEN, and after his death was adopted as the opinion of the court by the Justices who sat with him at the argument.

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The plaintiff's declaration alleges that the defendant was negligent in not furnishing suitable and proper apparatus and machinery for performing the work on which the plaintiff was engaged, so that the plaintiff's hand was drawn into a wheel connected with said apparatus and injured. The machinery and apparatus consisted of a steam-engine and drum, a rope, ice tongs, and two gin-wheels, and were used in hoisting cakes of ice up a steep incline, or run, about twenty-five feet, to the top of another run at right angles to the first, down which the ice was allowed to slide to the ice lofts. The rope passed from the drum on the engine through gin-wheels at the foot and at the top of the steep run, and terminated in a loop in which the ice tongs were suspended. When the ice was hoisted, the rope extending from the ice at the foot of the steep run, up through the upper gin-wheel, and down through the lower gin-wheel, and horizontally to the drum of the engine, was wound around the drum until the ice reached the top of the run, when it was stopped by stopping the engine. The upper gin-wheel was so situated that, when the ice reached the top of the steep run, it swung over into the other run, which sloped downward to the ice lofts. The plaintiff was employed to guide the ice from the top of the one run to the other, and to unhook the tongs from the ice and pull them back. On the occasion when the plaintiff was injured, according to his testimony, when the ice arrived at the top of the run, he took hold of the rope at the loop to guide or push the ice on to the other run. The rope was not stopped, and his hand was drawn with the rope into the gin-wheel, which was a few inches above his head.

The plaintiff contends that the works were defective, in that the gin-wheel was hung so low that it could be reached by the plaintiff's hand. It does not appear that it could have been hung higher in the building. The proper management of the apparatus required that the rope should be stopped when the ice reached the top of the run, and, if proper arrangements were made for that, there would appear to be no defect in the works from the liability to an injury like that which happened to the plaintiff. At any rate, if there was any defect in that respect, it was one which must have been known to the plaintiff, and the danger from it appreciated by him. The plaintiff further

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contends that there was evidence that the works were defective, in that there were not suitable and sufficient means provided for stopping the rope when the ice reached the top of the run. The means employed were to stop the engine, and it is not suggested by the plaintiff that this was not sufficient, or that any other should have been provided. But the plaintiff contends that the means for indicating to the engineer the time for stopping the engine was insufficient. The means was a mark upon the rope to indicate to the engineer when to stop the engine. The plaintiff contends that the jury may have found that this was an insecure mode of indicating to the engineer when the ice arrived at the top of the run, and that the engine ought to have been inside the building, where the engineer could see the ice and the upper gin-wheel, and decide in that way when the engine should be stopped. We think that it was not competent for the jury so to find upon the evidence.

The main contention of the plaintiff is that the mark on the rope was insufficient, and that the injury was caused by the slipping of the mark. The evidence, including the plaintiff's own testimony, tended to prove that the mark was a wire run through the strands of the rope and wound around it, and the ends twisted together, and that the wire was in place, the ends having slightly moved, but not so as to affect the wire as a mark, although one witness testified that the wire was wound around the rope, and not stuck through its strands. The jury could not have found, upon the evidence, that the mark had moved so as to affect the stopping of the engine. We think there was not evidence upon which the jury could have found that the mark on the rope was not a proper means for securing the stopping of the engine at the right time, or that its displacement was the cause of the injury to the plaintiff.

There was evidence to corroborate, and none to contradict, the testimony of the engineer, that the cake of ice raised at the time was larger than usual, and that he intentionally "went a few inches farther for it." It is unnecessary to consider whether, had the wire been defectively secured, it would have been a defect in the ways, works, or machinery existing through the negligence of the defendant. We are not disposed to think that it would have been. *Johnson* v. *Boston Tow-Boat*

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Co. 135 Mass. 209. *Moynihan* v. *Hills Co.* 146 Mass. 586. *Ryalls* v. *Mechanics' Mills*, 150 Mass. 190, 195. Upon a careful examination of the testimony, we think that it was not sufficient to authorize the jury to find that the injury to the plaintiff was in consequence of the neglect or negligence of the defendant, and that the court should have given the ruling requested by the defendant, that there was no evidence to warrant the jury in finding for the plaintiff.

Exceptions sustained.

JOSEPH L. PROCTOR *vs.* OLD COLONY RAILROAD COMPANY.

Barnstable. March 5, 1891. — June 29, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Tort — Admissions by Agent — Evidence.

In an action against a railroad company for setting back the waters of a stream upon the plaintiff's premises, evidence is admissible that the defendant's officers, in discussing at different interviews with the plaintiff his claim for damages, did not at any time deny the defendant's liability.

At the trial of an action against a railroad company for setting back the waters of a stream upon the defendant's premises, an admission of the defendant's liability by an attorney, to whom the plaintiff was referred by the defendant's president, is not competent in the absence of proof that the attorney was referred to in such a way as to constitute him an agent of the defendant, with authority to make admissions or promises to the plaintiff; and such proof, if offered at the close of the defendant's case, may, in the discretion of the presiding judge, be rejected as too late.

TORT, for setting back the waters of Bridge Creek upon the plaintiff's premises. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence tending to show that the plaintiff's premises were injured by the defendant's replacing a culvert across its road-bed by a pipe which was insufficient to carry off the waters of the creek, and caused them to overflow the same. The defendant offered evidence tending to show that the culvert was filled up and the pipe substituted at the request of

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the plaintiff's predecessor in title, and that therefore it was not liable in the action.

The plaintiff testified upon his direct examination, without objection, that he had numerous interviews with the president, general manager, and division superintendent of the defendant's road, concerning his damages caused by the setting back of the waters of Bridge Creek upon his premises.

The plaintiff was then asked the following questions concerning these interviews: 1. "Whether or not at any time any denial of liability has been made by the defendant or any of its officers?" 2. "Whether or not during these interviews any reference has been made by any of the defendant's officers, attorneys, or agents to any license or agreement by you or your grantors for the handling of the water in this way?" 3. "When did you first learn, if at all, that there was any claim of absence of liability on the part of the defendants, or any of their officers?" 4. "Whether or not there has been at any time any denial by the defendant, or any of its officers, of your right to have the culvert placed in the road-bed at this point?" The defendant objected, before answer, to each question, and the judge sustained the objections. The judge excluded the questions on the ground that the conversations, and not the inferences or understanding, of the plaintiff were admissible; and the plaintiff excepted.

The plaintiff offered to prove that he called upon the defendant's president, at the request of the superintendent of the division on which the premises lie, and that as the result of that interview the plaintiff was referred to Judge Hiram P. Harriman, the president saying that "they wanted to leave it to our attorney, Judge Harriman"; that thereupon the plaintiff submitted his books and evidence and dates to Judge Harriman, who made an examination of the premises, and stated as the result of that examination that a certain amount of money was due to the plaintiff. The plaintiff contended that the evidence was offered as a statement by a person expressly referred to, and that it was not an admission during compromise negotiations. The judge excluded the evidence, upon the defendant's objection, and the plaintiff excepted.

The plaintiff submitted in writing, after the close of the

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defendant's case, an offer of proof tending to show Judge Harriman's authority to act in the matter. The judge excluded the evidence upon the defendant's objection, among other reasons stating that it was not in rebuttal, and that it was not within the right of the plaintiff to claim it at that stage.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in March, 1891, and afterwards, in June following, was submitted to all the judges except *Barker*, J.

C. F. Chamberlayne, for the plaintiff.

C. F. Choate, Jr., (*J. H. Benton, Jr.* with him,) for the defendant.

ALLEN, J. The plaintiff testified that he had numerous interviews with the president, general manager, and division superintendent of the defendant company, concerning his damages caused by the setting back of the waters of Bridge Creek upon his premises; and then sought to show that in the discussions which took place between him and them they did not deny the defendant's liability for damages. There was no objection on the ground that these officers were not authorized to speak for the defendant upon the subject, but the court excluded the questions on the ground that the conversations, and not the inferences or understanding, of the plaintiff were admissible.

It seems to us that this was too narrow a view of the matter. If, in point of fact, the defendant's officers, in discussing the plaintiff's claim for damages with him, did not deny the defendant's liability for damages, the omission to make such denial might be considered by the jury. It would be in the nature of an admission, subject of course to be explained, but competent and proper to be laid before the jury. This is not like cases where a party is so situated that no inference can be drawn from his silence when a statement is made in his presence. *Commonwealth* v. *Kenney*, 12 Met. 235. *Commonwealth* v. *Harvey*, 1 Gray, 487.

If a party is so situated that he is not called upon to say anything, and does not say anything, his silence under such circumstances is not to be taken as furnishing any ground for an inference that he thereby made any admission. But in the case at bar there was evidence tending to show that the plaintiff had

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presented to the defendant's officers a claim for damages, and that the matter was under discussion at different interviews. If, under these circumstances, they made no denial of the defendant's liability while discussing the subject, the fact of such omission might properly be considered by the jury. It does not amount to an estoppel; but it is competent as bearing upon the question to be determined. It is conduct which is in the nature of an admission, if in such discussion the defendant's officers made no pretence that the defendant was not liable. *Parsons* v. *Martin*, 11 Gray, 111. *Pray* v. *Stebbins*, 141 Mass. 219, 224, 225. *Hayes* v. *Kelley*, 116 Mass. 300. It is somewhat like an omission to testify, or to produce books, or to furnish explanations, when called on to do so. *Whitney* v. *Bayley*, 4 Allen, 173. *McDonough* v. *O'Niel*, 113 Mass. 92. *Eldridge* v. *Hawley*, 115 Mass. 410. *Huntsman* v. *Nichols*, 116 Mass. 521. *Cheney* v. *Gleason*, 125 Mass. 166, 176.

The presiding justice appears to have excluded the questions on the ground that the conversations themselves, when testified to, would show whether or not the defendant's officers denied that the defendant was liable. This would be so if there were a single brief conversation, the whole of which could be given. But where there have been numerous interviews with different officers, it is not to be supposed that the whole of every conversation can be given, and in such case the plaintiff ought to be allowed to testify, once for all, that never at any time was there a denial of liability. The practical question is, How shall the result be reached of getting before the jury the fact that no such denial was made? It seems to us, under the circumstances presented by the bill of exceptions, that the plaintiff ought to have been allowed to answer the first, second, or fourth questions which were put to him by his counsel, so as to be able to present to the jury distinctly his claim that there never had been any denial of liability. It was of course entirely proper to call for the whole of all the conversations; but since it is not to be supposed that every word can be repeated, the plaintiff should have been allowed to ask the general question which was excluded.

The third question is only significant as supporting the same view, and of itself alone would properly be excluded.

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The plaintiff, in putting in his case in chief, offered to show certain statements by Judge Harriman as the result of an examination of the premises made by him. This evidence was properly excluded. It would not follow from the plaintiff's offer of proof that Judge Harriman was referred to in such a way as to constitute him an agent for the defendant, with authority to make admissions or promises to the plaintiff. *Rosenbury* v. *Angell*, 6 Mich. 508.

The subsequent more formal offer, after the close of the defendant's case, might properly be excluded, in the discretion of the court, as too late. *Exceptions sustained.*

JOHN BAINARD *vs.* CITY OF NEWTON.

Middlesex. March 23, 24, 1891. — June 29, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Watercourse — Surface Water — Pollution.

A small and occasional increase of the flow of surface water into a stream, and the pollution of its waters by the usual impurities from streets, both occasioned by the due construction by a city of a system of surface drainage in some of its streets and ways, does not, apart from statute, afford a cause of action against the city to an owner lower down the stream; but his remedy, if any, is under the statute.

HOLMES, J. This is a bill in equity to enjoin the city of Newton from discharging sewage into a brook called Cheese Cake Brook, above the plaintiff's land upon the brook, and from emptying more water into it than would flow into it naturally. The master's report shows that the city has constructed a system of surface drainage in some of its streets and ways under the powers relating to the public streets and ways, and that no drainage comes into the brook except what comes from the ordinary wash of these streets and ways. In one place in the watershed west of the brook the surface water gathered into a small stream for some thirteen hundred feet, and then spread over the surface again and disappeared below the plaintiff's land. A "small but substantial" portion of the water from the western

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water-shed, including perhaps a portion of the last mentioned water, and water from the eastern water-shed, which before had not entered the brook, now flows into it through the drains. The increase occurs mainly in heavy rains and sudden thaws, generally does not last many days, and is not found to cause the brook to overflow. The surface drainage into the brook being now from streets, the water is no longer clear, the fish have been driven from it, and at times it has a disagreeable smell, not found to amount to a nuisance.

Upon these facts, we are of opinion that the bill must be dismissed. The pollution of the water by the usual impurities from streets is not a cause of action. The use of his land for streets, with the usual consequences to owners lower down upon the stream, would not exceed the common law rights of an upper owner. *Wheeler* v. *Worcester*, 10 Allen, 591, 602. *Merrifield* v. *Worcester*, 110 Mass. 216, 220. See *Middlesex Co.* v. *McCue*, 149 Mass. 103. Equally little can the plaintiff complain of the increased discharge of surface water into the stream. We do not say that no change of the water-shed on a large scale could give rise to a cause of action on the part of a lower proprietor. But a change which only slightly and occasionally enlarges the flow of a natural stream within its capacity, and does not make it overflow, is not actionable. *Jackman* v. *Arlington Mills*, 137 Mass. 277, 283. Again, so far as appears, all the damage to the plaintiff, if any, was the necessary consequence of the laying out of the streets and ways from which the surface drainage came. If so, and if the statutes impose a greater liability than the common law for this damage, when so caused, (*Woodbury* v. *Beverly*, 153 Mass. 245,) the only remedy is under the statute. *Flagg* v. *Worcester*, 13 Gray, 601, 603. *Wheeler* v. *Worcester*, 10 Allen, 591, 603. *Collins* v. *Waltham*, 151 Mass. 196, 198.

Bill dismissed.

S. H. Dudley, for the plaintiff.

W. S. Slocum, for the defendant.

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JAMES H. FREELAND & others *vs.* ERNEST F. RITZ & another.

Suffolk. March 4, 1891. — July 28, 1891.

Present: HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Lease — Statute of Frauds — Waiver — Pleading.

It is no objection to a written contract that some of its terms are to be fixed by something to be done in the future, if that something is done before an action is brought thereon; and if it is then in writing, the provisions of the statute of frauds are complied with.

A written agreement for the sublease of rooms in a building in process of erection, which recites an agreement by the owner to lease the building to the proposed sublessor, and provides that such sublease is to be made as soon as the building is ready for occupancy and a lease thereof is delivered, and to be "subject in all respects" to such owner's agreement and lease, is sufficient to satisfy the statute of frauds, if the lease of the building, though not at the time in existence, is executed and delivered before action is brought for a breach of the agreement for a sublease.

If a lease tendered for acceptance differs in various particulars from the form agreed upon by the parties, and the proposed lessee, without objecting thereto, expresses his unwillingness to accept a lease in any form, he may be found to have waived a strict compliance by the lessor with the terms of the agreement.

In an action for breach of an agreement to sublet rooms in a building in process of erection, which agreement is incomplete in itself, because made subject to a proposed lease to the plaintiff to be executed when the building is ready for occupancy, the terms of such lease to the plaintiff, if executed before the action is brought, should be set forth, so far as they are material to complete the agreement sued upon, with appropriate allegations; and the plaintiff, if he relies upon a waiver by the defendant, should plead it as an excuse for nonperformance.

CONTRACT, for breach of an agreement to lease certain rooms on the sixth floor of the Boylston Building in Boston. Writ dated April 20, 1889. Trial in the Superior Court, before *Pitman*, J., who ordered a verdict for the defendants, and reported the case for the determination of this court. If the plaintiffs could recover on the evidence in any form of action, the verdict was to be set aside and the case stand for trial; otherwise, judgment was to be entered upon the verdict. The facts appear in the opinion.

C. Browne & G. A. O. Ernst, for the plaintiffs.

H. W. Bragg, for Ritz.

W. S. Slocum, for Glines.

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LATHROP, J. This is an action of contract, brought by the members of the firm of Freeland, Loomis, and Company against the members of the firm of Ritz and Glines, for the breach of an agreement, under seal and signed by the parties, to accept a lease of certain rooms in a building.

The agreement declared on recited that a building was then in process of erection by the Boylston Market Association, on the corner of Washington Street and Boylston Street, in Boston; that Freeland, Loomis, and Company had entered into an agreement with said association for a lease of said building as soon as the same should be completed; and that Ritz and Glines were desirous of obtaining from Freeland, Loomis, and Company a lease of part of said building, "to wit, rooms on the sixth floor thereof, as marked on plan of said floor, in the possession of Freeland, Loomis, and Company, containing about twenty-five hundred (2,500) square feet, more or less, and situated in the northeasterly corner of said building, for the purpose of there conducting the photographing business." Freeland, Loomis, and Company agreed, as soon as the building should be ready for occupancy, and a lease thereof executed and delivered to them, to execute and deliver, and Ritz and Glines agreed to accept, "a lease of the rooms aforesaid, to be used solely and exclusively for the business aforesaid, for a period of five (5) years from the date of the completion of said building, at an annual rental of twenty-five hundred dollars ($2,500), payable in equal monthly instalments, the lease to be in substantial accordance with the blank form hereunto annexed, and to be made subject in all respects to the terms and conditions of the said agreement and lease between said Freeland, Loomis, and Company and said Boylston Market Association."

1. The defendants contend that, inasmuch as the agreement provides that the lease is "to be made subject in all respects to . . . the said agreement and lease between" the plaintiffs and their lessor, which lease was not then in existence, there is no sufficient agreement or memorandum to satisfy the statute of frauds. Pub. Sts. c. 78, § 1, cl. 4.

The agreement declared on is dated April 17, 1888, and it is clear that, considered alone, it is insufficient to satisfy the statute, for some of its terms were then uncertain, and might never

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be made certain. *May* v. *Ward*, 134 Mass. 127. *Ashcroft* v. *Butterworth*, 136 Mass. 511. What was then uncertain has, however, since been made certain, as it appears by the report upon which the case comes before us that in January, 1889, before this action was brought, a lease in writing of the entire building was delivered to the plaintiffs by their lessor.

It is a well settled rule of law, that, while the memorandum must express the essential elements of the contract with reasonable certainty, these may be gathered either from the terms of the memorandum itself, or from some other paper or papers therein referred to. If one of a series of papers which appear to have relation to the same contract is signed by the party to be charged, this is enough, as all the papers are to be considered together, as forming one contract or memorandum. There is no doubt also that parol evidence is admissible to identify any paper referred to. *Atwood* v. *Cobb*, 16 Pick. 227, 230. *Lerned* v. *Wannemacher*, 9 Allen, 412. *Rhoades* v. *Castner*, 12 Allen, 130. *Beckwith* v. *Talbot*, 95 U. S. 289. *Grafton* v. *Cummings*, 99 U. S. 100. *Ryan* v. *United States*, 136 U. S. 68, 83. *Peck* v. *Vandemark*, 99 N. Y. 29. *Louisville Asphalt Varnish Co.* v. *Lorick*, 29 S. C. 533. *Ridgway* v. *Wharton*, 6 H. L. Cas. 238. *Fitzmaurice* v. *Bayley*, 9 H. L. Cas. 78, 102. *Baumann* v. *James*, L. R. 3 Ch. 508. *Shardlow* v. *Cotterell*, 18 Ch. D. 280, and 20 Ch. D. 90. *Studds* v. *Watson*, 28 Ch. D. 305. *Oliver* v. *Hunting*, 44 Ch. D. 205. *Long* v. *Millar*, 4 C. P. D. 450. *Cave* v. *Hastings*, 7 Q. B. D. 125.

The defendants, however, contend that these principles apply only to papers already in existence when the instrument signed by the party sought to be charged is executed; and, in support of this view, rely upon the case of *Wood* v. *Midgley*, 2 Sm. & G. 115; *S. C.* on appeal, 5 DeG., M. & G. 41. This was a bill for specific performance of a contract of sale of land. Some of the terms had been reduced to writing, but not signed. The purchaser paid his deposit money to the auctioneer who sold the land, and he signed the following receipt: "Memorandum. Mr. Thomas Midgley has paid to me the sum of £50 as a deposit and in part payment of £1,000, for the purchase of the Ship and Camel public-house at Dockhead, the terms to be expressed in an agreement, to be signed as soon as prepared." Vice Chan-

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cellor Stuart overruled a demurrer to the bill, on the ground that the memorandum to be prepared and signed was only the fair copy of the draft as settled and agreed to. On appeal, the demurrer was sustained by Lord Justice Turner and Lord Justice Knight Bruce, on the ground that the agreement referred to, although it fixed the price, left other points to be determined. "The conditions of sale were to be adapted to a sale by private contract, and were to be subject to a future agreement." The case is, therefore, one of an agreement incomplete when made, and which never was completed. See also *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; *Fitzmaurice* v. *Bayley*, 9 H. L. Cas. 78; *Rummens* v. *Robins*, 3 DeG., J. & S. 88.

In *Brown* v. *Bellows*, 4 Pick. 179, the plaintiff and the defendant were owners of a water privilege, with the building thereon, etc. The plaintiff agreed to sell his interest, and the defendant agreed to buy it, "at such prices as shall be agreed on and awarded by three men, one chosen by the plaintiff, one by the defendant, and the third by the two thus chosen, which award shall be final and binding on the parties." After the price had been thus determined in writing, the defendant refused to perform his agreement. The plaintiff brought an action for covenant broken, to which the defendant set up the statute of frauds, contending that the referees were not named in the agreement, and that it depended wholly upon parol evidence to determine who they were. This objection was disposed of by the court's saying that the contract had been performed in this respect. The defendant further contended that the price should have been fixed by the agreement, whereas it was to be ascertained by the referees. But this objection was overruled. The last point decided in this case, therefore, is a direct authority for the proposition that it is no objection to a written contract that some of its terms are to be fixed by something to be done in the future, if that something is done before action is brought; and that, if it is in writing, the provisions of the statute of frauds are complied with.

We are therefore of opinion that the statute of frauds is no defence to this action.

2. The defendants further contend, that the plaintiffs are not entitled to recover, because they have not performed their part

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of the agreement. It appears from the report that the plaintiffs, on February 11, 1889, sent to the defendants a letter in regard to the rooms in the new building, and in regard to their lease, to which letter the defendants made no reply. There was evidence that duplicate leases were sent to the defendant Ritz about February 15, 1889; that he afterward sent one of them to the defendant Glines; that these leases were in the possession of the defendants at the time of the trial; that the plaintiffs had not seen or heard from Ritz after sending the leases; that, two or three weeks after February 15, Glines had called on the plaintiffs and said that he was ready to sign but Ritz would not, and that Ritz would not go in company with him; and that neither defendant had signed the lease, or offered to sign any form of lease. Glines, who was called as a witness by the plaintiffs, testified that Ritz declined to have anything to do with him in this matter; and that he, Glines, had said that he could not sign because Ritz would not, as he had not the money to carry it out if he did sign. It was agreed that prior to the bringing of the action the defendants had said to the plaintiffs that they should not sign the lease, and the plaintiffs might go ahead and let the rooms.

The defendants' counsel pointed out, at the argument, several particulars in which, as they contended, the lease sent to the defendants differed from the form annexed to the agreement. We do not find it necessary to consider these, as we are of opinion that, on the evidence, the jury might well have found that the defendants made no objection to the lease sent them, were not willing to accept a lease in any form, and therefore waived a strict compliance by the plaintiffs with the terms of the agreement. See *Gerrish* v. *Norris*, 9 Cush. 167, as modified by *Holdsworth* v. *Tucker*, 143 Mass. 369, 375; *Brewer* v. *Winchester*, 2 Allen, 389; *Curtis* v. *Aspinwall*, 114 Mass. 187, 193; *Lowe* v. *Harwood*, 139 Mass. 133.

3. At the trial, the presiding judge ruled that the action in its present form could not be maintained, and ordered a verdict for the defendants, reserving the right to the plaintiffs to move to amend, upon such terms as the Superior Court might order, if, in the opinion of the Supreme Judicial Court, the plaintiffs, upon the evidence, would have the right to recover in any form of action at law, in which event the verdict was to be set aside,

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and the case to stand for trial. At the argument in this court, no objection was made either to the form of the action or to the declaration. We have not, therefore, carefully scrutinized either. It is obvious, however, that, as the contract declared on is incomplete in itself, the terms of the lease to the plaintiffs from their lessor, as far as they are material to complete the contract, should be set forth with appropriate allegations; and that if the plaintiffs rely upon a waiver by the defendants, it should be pleaded as an excuse for non-performance. *Palmer* v. *Sawyer*, 114 Mass. 1, 15. Whether the substitute declaration, so called, sufficiently sets forth a waiver, need not be considered, as the point has not been argued.

The result is, therefore, that the verdict is to be set aside, and the case stand for trial. *So ordered.*

ELLEN N. SMITH *vs.* AMOZ SMITH.

Dukes County. October 28, 1890. — September 1, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Separate Maintenance — Notice — Condonation.

A wife, who is actually living apart from her husband for a justifiable cause, can maintain a petition for separate support under the Pub. Sts. c. 147, § 33, even though at the time of her filing her petition he had no notice, express or implied, that she was so living.

A wife, having suffered personal violence at her husband's hands, thereafter slept in another house and denied him access, though daily going to his house and performing all her duties there. After finishing her work one evening as usual, she left his house and never returned, and on the following day filed her petition in the Probate Court for separate maintenance. *Held*, that a finding was warranted that she was living apart from her husband when she filed her petition; and that it could not be said, as matter of law, that she had condoned her husband's misconduct.

PETITION by a wife to the Probate Court for separate maintenance and the custody of children.

In the Superior Court, on appeal, before *Barker*, J., it appeared in evidence that the parties were husband and wife, and

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before October 14, 1889, lived together on a farm near Edgartown, in a dwelling-house situated about one hundred feet from that of the respondent's father, and in the same yard. There was also evidence, which was contradicted, that on several occasions from August 18 to November 29, 1889, the respondent addressed profane language to the petitioner, and, when provoked by her, was guilty of various acts of personal violence towards her. The evidence also tended to show that after October 14, 1889, the petitioner each night went to the house of the respondent's father and there slept, and did not again sleep in the same house with the respondent, and thenceforward denied him access; that each morning before breakfast she came to the respondent's house and prepared the breakfast for the household, and throughout the day performed all her usual duties about the house and in the care of the children, until in the evening again she went to her father in law's house to sleep; that she pursued this routine daily until the evening of December 20, 1889, when, after getting supper and putting the children to bed, she went to the other house, where she slept; that on the morning of December 21 following, without returning to the respondent's house, or notifying him of her change of plans or intention, she went to Edgartown and filed this petition in the Probate Court.

The judge found that during the period from October 14 to December 21, so far as her husband was concerned, she had the intention of making an absolute separation between them, and simply waited for what seemed to her a favorable and proper opportunity to make that separation. The judge refused to rule, as requested by the respondent, among other things, as follows:

"1. That although the wife occupied a separate bed in the house of her father in law, near by in the same yard, the parties were not during that period, to wit, from October 14, 1889, actually living separate and apart from each other. That during that period they were living together, within the meaning of the law.

"2. That to constitute the condition of actually living separate and apart from each other, within the meaning of the statute, there must have been some continuity. It must have

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existed a period of at least twenty-four hours, and the respondent submits that the undisputed facts in evidence show that they were living together up to the morning of the day she signed her petition. . . .

"4. That, upon the facts shown, the parties were not actually living separate and apart from each other at the time she signed the petition.

"5. That from and after November 29, the evidence does not disclose any plausible cause for her to leave her husband; that her acts subsequent to that time, and up to December 21, show that she had condoned any act of his of which she might complain, and for that reason she cannot maintain her petition for the causes relied upon. . . .

"7. That, upon the whole evidence, the petitioner has not shown sufficient cause for any decree in her favor under the statute, and that, as matter of law, taking the whole evidence into account, the respondent is entitled to a decree that the petition be dismissed."

The judge ruled that it was competent for him to find upon the evidence that she was, at the time of bringing her petition, actually living separate and apart from her husband; and that he was not required, as matter of law, to find that the petitioner had condoned her husband's misconduct.

The judge made a decree in favor of the petitioner; and the respondent alleged exceptions.

The case was argued at the bar in October, 1890, and afterwards, in June, 1891, was submitted on the briefs to all the judges.

J. Brown & R. C. Brown, for the respondent.

W. H. Powers, for the petitioner.

KNOWLTON, J. If in this case we assume in favor of the respondent that the respondent and his wife were not living apart from each other while she was accustomed daily to go to his house and perform household duties there, it does not follow that the petition must be dismissed. The presiding justice found as a fact, upon evidence which was sufficient to warrant the finding, that the respondent's conduct was such as to justify his wife in living separate and apart from him. He further found that, while she was sleeping away from her husband in

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his father's house, and daily going to her husband's house to attend to her duties there, "she had the intention of making an absolute separation between them, and simply waited for what seemed to her a favorable and proper opportunity to make that separation." After finishing her work, and going to the house of her husband's father one night, as usual, she ceased to attend at the home of her husband, and on the following day went away and filed her petition in the Probate Court.

The judge ruled that it was competent for him "to find, upon the evidence, that she was, at the time of bringing her petition, actually living separate and apart from her husband." Under the circumstances, the judge might well have believed that, when she left her husband's house on the evening before commencing her suit, she had no intention of returning, but intended to make her home at his father's house, where she was then lodging. When she filed her petition she was in fact not only sleeping, but taking her meals, away from her husband's home, and she has not lived with him since.

The court found that she did not communicate to her husband her intention of making an absolute separation between them, and there is no evidence that, after she ceased to attend to the affairs of his house, he had any notice of her intention to change her relations with him until after she filed this petition. The important question in the case is whether a wife can file a petition under this statute on the ground that she is actually living apart from her husband for a justifiable cause, without first giving him notice, express or implied, that she is so living. Following strictly the language of the statute, nothing is required as a preliminary to the petition but actually living apart from her husband for justifiable cause. The statute is a remedial one, for the benefit of wives and children. It will seldom happen that a wife will be living apart from her husband without his knowledge, but if she is, we see no reason for importing into the law by judicial construction what is not written there. If a suit is brought which the husband has no reason to anticipate, he can suffer nothing beyond being compelled to furnish her support away from him, if the court thinks she is entitled to it. There may be cases when it would be important to the wife, in view of an expected conveyance by the husband of his property, to be

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able to obtain security by attachment for her support immediately after beginning to live apart from him, and when by reason of his absence, or for some other cause, he would have no notice that she had ceased to live with him.

We are of opinion that the statute permits the commencement of a suit immediately after a wife has begun actually to live apart from her husband for justifiable cause, even though he has no knowledge of it.

It cannot be said, as matter of law, that the petitioner condoned the unlawful acts of her husband.

In view of the findings of fact made by the presiding justice, a majority of the court are of opinion that the respondent was not injured by anything that occurred at the trial.

Exceptions overruled.

WENDELL H. COBB *vs.* SUSAN H. KEMPTON.
MARY L. JENNINGS *vs.* DAVID B. KEMPTON.

Bristol. October 30, 1890. — September 1, 1891.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Estate of Deceased Person — Limitation of Action — Guardian — License to sell Real Estate — Removal of Administrator.

A claim for a balance due to a ward from a guardian deceased intestate, upon an account filed by him in his lifetime, which is not allowed by the Probate Court until more than six years after the taking out of administration on his estate, is within § 13 of the Pub. Sts. c. 136, which provides for the retention of assets to meet causes of action not accruing within two years thereafter; and may be presented to that court at any time before the estate is fully administered.

A decree of the Probate Court showing a balance due from a guardian to his ward upon the expiration of the guardianship, and the refusal of the guardian or his representative to pay it over in accordance with such decree, create a debt in favor of the ward, for which he may sue in his own name.

Pending a petition to the Superior Court, under the Pub. Sts. c. 186, § 13, upon which no order has been made, for the retention of assets to meet a claim against the estate of a person deceased intestate not accruing within two years from the taking out of administration thereon, a petition will not lie for a license to sell the real estate to meet the same, and a refusal by the administrator to apply for such a license affords no ground for his removal.

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TWO PETITIONS to the Probate Court, in the first case by Wendell H. Cobb, one of the administrators of the estate of John H. Jennings, for a license to sell the real estate for the payment of a debt, and in the second case by Mary L. Jennings, the creditor named in the first petition, who is executrix of the will of Herbert R. Jennings, for the removal of David B. Kempton, the co-administrator of Cobb, for his refusal to join in the first petition. The Probate Court dismissed both petitions; and the petitioners, in December, 1889, appealed to this court.

At the hearing, before *Allen*, J., it appeared in evidence that the alleged debt was the balance due upon an account rendered by the intestate to the Probate Court on June 2, 1882, as guardian of his infant son, Herbert R. Jennings; that Herbert R. became of full age in April, 1884, and died in January, 1886, leaving a will which was duly admitted to probate, and by which his widow, Mary L., was made executrix and residuary legatee; that the intestate died on July 31, 1882, and Cobb and David B. Kempton were appointed administrators of his estate in October, 1882, and duly published notice of their appointment; that Cobb as administrator filed an inventory on September 5, 1884, of the real estate sought to be sold, but David B. refused to join in the filing of the same; that the only persons interested in such real estate were Mary L. Jennings and Susan H. Kempton, the respondent in the first case, who was a daughter of the intestate and the wife of David B.; that no further proceedings had ever been had in the Probate Court by the administrators of the estate of John H. Jennings, or by either of them; that in January, 1890, Mary L. filed a petition in the Probate Court, under the Pub. Sts. c. 136, § 13, and on February 10 following also commenced an action for the balance of the intestate's account as such guardian against such administrators, under the Pub. Sts. c. 136, § 14, which suit is now pending, and also an action against Susan H. for rents collected.

The judge ruled that both petitions must be dismissed, the first because the claim was not enforceable in law against the administrators, and the second on the ground that the petition to sell the real estate could not be enforced; and reported both cases for the consideration of the full court.

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The cases were argued at the bar in October, 1890, and afterwards, in June, 1891, were submitted on the briefs to all the judges except *Holmes*, J.

A. French & C. W. Clifford, for the petitioners.

E. L. Barney, for the respondents.

KNOWLTON, J. The first of these cases is a petition of one of the administrators of the estate of John H. Jennings, late of New Bedford, deceased, for leave to sell real estate for the payment of debts, and the second is a petition brought by the creditor for the removal of David H. Kempton, the co-administrator, for his refusal to join in the first petition. It is contended by the respondent in the first case, that the debt for the payment of which the petitioner seeks to sell the real estate is barred by the statute of limitations, and there is no doubt that this contention is correct unless the right to collect it exists under the provisions of the Pub. Sts. c. 136, § 13. Wendell H. Cobb and David B. Kempton were appointed administrators in October, 1882, and duly published notice of their appointment. By the Pub. Sts. c. 136, § 9, all claims against the estate of their intestate were barred at the expiration of two years from the time of their appointment, except as provided in the subsequent sections of the chapter. This case falls within none of those sections, unless it be § 13, which is as follows: "A creditor of the deceased, whose right of action does not accrue within two years after the giving of the administration bond, may present his claim to the Probate Court at any time before the estate is fully administered; and if, on examination thereof, it appears to the court that such claim is or may become justly due from the estate, it shall order the executor or administrator to retain in his hands sufficient to satisfy the same. But if a person interested in the estate offers to give bond to the alleged creditor with sufficient surety or sureties for the payment of his claim in case it is proved to be due, the court may order such bond to be taken, instead of requiring assets to be retained as aforesaid." The debt is a balance found due from the intestate on the settlement in the Probate Court of his account as guardian of his son, Herbert R. Jennings, which account he filed in his lifetime, on June 2, 1882. This account remained on the files of the Probate Court without any action thereon until May 3, 1889, when

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it was allowed. The failure of the administrators to pay over this balance to the executrix of the will of Herbert R. Jennings constitutes the cause of the action on which it is contended that the real estate should be sold. That right of action did not accrue until the account was acted upon by the Probate Court. Whether a cause of action previously existed for a breach of the condition of the guardian's bond in any particular which might have been enforced by a suit brought in the name of the judge of probate by authority of the Probate Court, it is unnecessary to decide. This particular cause of action for failure to pay over a definite amount found due on the settlement of the account came into existence after the decree allowing the account. Until then the guardian was not liable to an action for the money. *Brooks* v. *Brooks*, 11 Cush. 18. *Bemis* v. *Bemis*, 13 Gray, 559. *Chapin* v. *Livermore*, 13 Gray, 561. *McLane* v. *Curran*, 133 Mass. 531.

It has never been decided in this Commonwealth, so far as we are aware, whether a guardian may be sued directly by his ward for the balance found due on the settlement of his account in the Probate Court after the expiration of his guardianship, or whether the remedy of the ward is exclusively upon the probate bond. But we are of opinion that the decree of the Probate Court, and the refusal of the representatives of the guardian to pay over, in accordance with it, creates a debt in favor of the ward, for which he may sue in his own name. It has been so held in regard to administrators in analogous cases. *Storer* v. *Storer*, 6 Mass. 390. *Drew* v. *Gordon*, 13 Allen, 120, 122. Prior to the St. of 1880, c. 34, a testamentary guardian was not required to give a bond at all when a testator ordered or requested in his will that no bond should be given. Gen. Sts. c. 109, § 6. The protection of a ward whose guardian gave no bond would require us to hold that the final decree of the Probate Court, showing a balance due him after the expiration of the guardianship, creates a liability at common law; and the same rule must apply to all guardians.

In the present case, the estate of John H. Jennings had not been fully settled when the petition for the retention of assets was filed, in January, 1890, and the claim of the creditor comes within the provisions of the Pub. Sts. c. 136, § 13. Whether

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any action has been taken on this petition does not appear; but we see no reason why it should not be granted, unless some person interested in the estate gives a bond with sufficient surety or sureties for the payment of the claim. Until this petition is favorably acted upon, no action can be maintained for the debt. *Brooks* v. *Rayner*, 127 Mass. 268. Until then it cannot be determined whether the right of action will be against the administrator, or against the persons who give the bond to pay the debt. Pub. Sts. c. 136, § 15. When the petition for leave to sell real estate was filed, it was uncertain whether an action could ever be maintained against the administrators; and the administrator David B. Kempton was right in refusing to sign the petition, and the Probate Court was right in dismissing it. The petition for the retention of assets has been filed since the appeal in the Probate Court, and we are not informed whether any action has been taken on it. If it has been granted, or if it is granted hereafter, leave to sell real estate cannot be given on the present petition, because it is signed by only one of the administrators. *Hannum* v. *Day*, 105 Mass. 33.

The decree in each case dismissing the petition must be affirmed, and the parties left to their remedies after the disposition of the petition for the retention of assets to satisfy the claim. *Decree in each case affirmed.*

SUE MACDONALD *vs.* GEORGE H. MORRILL & others.

Norfolk. November 11, 1890. — September 1, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Deed — Boundary — "River" — Latent Ambiguity.

A landowner on the north side of N. River — about five years after a new channel somewhat north of the original and natural channel of the river, which formed a bow, had been cut by a third person through the land, forming a chord to the bow — conveyed his land bounding it "southerly by the N. River," and afterwards such third person took possession of the small parcel between the chord and the bow. Some water still ran in the old channel at the time of the conveyance, but the thread of the stream was in the new channel. *Held*, on a writ of entry

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by the grantee against such third person to recover such intervening parcel, that the jury would be warranted in finding that the boundary in the deed referred to the old channel.

WRIT OF ENTRY, to recover a parcel of land in Norwood. Trial in the Superior Court, before *Pitman*, J., who ordered a verdict for the tenants, and reported the case for the determination of this court. The facts appear in the opinion.

The case was argued at the bar in November, 1890, and afterwards, in June, 1891, was submitted on the briefs to all the judges except *Lathrop* and *Barker*, JJ.

C. D. Adams, for the demandant.

A. B. Wentworth, for the tenants.

HOLMES, J. This is a writ of entry for a piece of land lying between the present and the former channel of the Neponset River. The former channel was a bow, the present is a straight line making a chord of the bow. The demandant's grantor owned land north of the river, including the demanded premises, and conveyed to the demandant a tract bounded "southerly by the Neponset River." The point in dispute at the trial was whether the demandant took to the old or only to the new channel. The tenants owned land south of the river, and the demandant's evidence was that before the conveyance to her they had dug the present channel through the land of the grantor, and that after the conveyance and before the date of the writ they took possession of the demanded premises.

The demandant admitted that the thread of the stream was in the present channel at the time she took her deed, but asked for a ruling that, if the present channel was an artificial one, which was dug by the tenants, and into which they had diverted the stream from its natural course, her line extended to the old and natural channel. The presiding judge declined so to rule, ruled that the demandant's boundary line was the Neponset River as it ran at the time of the deed, no matter how it came to run so, and, as the demandant did not wish to go to the jury if this ruling was correct, directed a verdict for the tenants, and reported the case.

We are apprehensive that the ruling did injustice to the demandant. It appears from the evidence that water still ran in the old channel, and that the new one had been cut only about

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five years. The meaning of the deed is not so fixed and certain that it might not be altered by circumstances. The language could be used to signify the old stream without perversion. It is to be inferred from the bill of exceptions that the demandant's grantor owned no land on the other side of the old stream adjoining the parcel in controversy, and therefore that he had no access to it unless he should be held to have reserved by implication a way of necessity over the granted premises. It would seem from the writ that the strip in question is so small as to be of little value to the demandant's grantor. It is one hundred and fifty feet on the river, and fifty feet at the widest point between the arc and the chord. The grantor seems not to have claimed it. If these are the facts, and all the facts, the demandant was entitled to the ruling she asked, or at least there was such a latent ambiguity that the jury would have been warranted in finding that the deed meant the river *de jure*, so to speak, and not the river *de facto*. See *Waterman* v. *Johnson*, 13 Pick. 261, 267; *Gerrish* v. *Towne*, 3 Gray, 82, 88, 89; *Paine* v. *Woods*, 108 Mass. 160, 171; *Emery* v. *Webster*, 42 Maine, 204; *Hill* v. *Evans*, 4 DeG., F. & J. 288, 293, *et seq.*; *S. C.* 31 L. J. Ch. 457, 460, *et seq.*; *Betts* v. *Menzies*, 10 H. L. Cas. 117, 152, 153, 154; *Bischoff* v. *Wethered*, 9 Wall. 812, 816; *Altham's case*, 8 Co. Rep. 150 b, 155 b. *New trial ordered.*

MARY E. O'BRIEN *vs.* CUNARD STEAMSHIP COMPANY.

Suffolk. January 19, 1891. — September 1, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Carrier by Sea — Surgeon — Assault — Negligent Vaccination.

If the surgeon of a foreign steamship, bringing immigrants to a port of this country where the quarantine regulations require vaccination as a prerequisite to landing, vaccinates one of them whose behavior indicates consent on her part, whatever her unexpressed feelings may be, he is justified in his act, and the ship-owner is not liable therefor as for an assault.

A ship-owner who provides a competent surgeon, whom the passengers may employ if they choose, is not liable for his negligence in the medical treatment of a passenger, either at common law or by the U. S. St. of August 2, 1882, § 5, which requires every vessel transporting immigrant passengers to carry a surgeon or

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medical practitioner, "who shall be rated as such in the ship's articles, and who shall be provided with surgical instruments, medical comforts, and medicines," and makes the master of the vessel liable to a penalty for its violation.

In an action against a steamship company for assault by a ship's surgeon in vaccinating a steerage passenger brought to a port in this State, evidence consisting of the printed quarantine regulations of the port, to the effect that only such steerage passengers as held certificates from such surgeon that they had been vaccinated would be allowed to land without detention or vaccination, and of testimony that such regulations were carried out, was *held* to be properly admitted.

TORT, for an assault, and for negligently vaccinating the plaintiff, a steerage passenger on the steamship Catalonia. Trial in the Superior Court, before *Staples*, J., who ruled that, upon the evidence, the plaintiff could not maintain the action, and ordered a verdict for the defendant; and the plaintiff alleged exceptions. The nature of the evidence appears in the opinion.

E. N. Hill & F. Cunningham, for the plaintiff.

G. Putnam, (*T. Russell* with him,) for the defendant.

KNOWLTON, J. This case presents two questions: first, whether there was any evidence to warrant the jury in finding that the defendant, by any of its servants or agents, committed an assault on the plaintiff; secondly, whether there was evidence on which the jury could have found that the defendant was guilty of negligence towards the plaintiff. To sustain the first count, which was for an alleged assault, the plaintiff relied on the fact that the surgeon who was employed by the defendant vaccinated her on shipboard, while she was on her passage from Queenstown to Boston. On this branch of the case the question is whether there was any evidence that the surgeon used force upon the plaintiff against her will. In determining whether the act was lawful or unlawful, the surgeon's conduct must be considered in connection with the circumstances. If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of her feelings. *Ford* v. *Ford*, 143 Mass. 577, 578. *McCarthy* v. *Boston & Lowell Railroad*, 148 Mass. 550, 552. It is undisputed that at Boston there are strict quarantine regulations in regard to the examination of immigrants, to see that they are protected from small-pox by vaccination, and that only those

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persons who hold a certificate from the medical officer of the steamship, stating that they are so protected, are permitted to land without detention in quarantine or vaccination by the port physician. It appears that the defendant is accustomed to have its surgeons vaccinate all immigrants who desire it, and who are not protected by previous vaccination, and give them a certificate which is accepted at quarantine as evidence of their protection. Notices of the regulations at quarantine, and of the willingness of the ship's medical officer to vaccinate such as needed vaccination, were posted about the ship, in various languages, and on the day when the operation was performed the surgeon had a right to presume that she and the other women who were vaccinated understood the importance and purpose of vaccination for those who bore no marks to show that they were protected. By the plaintiff's testimony, which in this particular is undisputed, it appears that about two hundred women passengers were assembled below, and she understood from conversation with them that they were to be vaccinated; that she stood about fifteen feet from the surgeon, and saw them form in a line and pass in turn before him; that he "examined their arms, and, passing some of them by, proceeded to vaccinate those that had no mark"; that she did not hear him say anything to any of them; that upon being passed by they each received a card and went on deck; that when her turn came she showed him her arm, and he looked at it and said there was no mark, and that she should be vaccinated; that she told him she had been vaccinated before and it left no mark; "that he then said nothing, that he should vaccinate her again"; that she held up her arm to be vaccinated; that no one touched her; that she did not tell him that she did not want to be vaccinated; and that she took the ticket which he gave her certifying that he had vaccinated her, and used it at quarantine. She was one of a large number of women who were vaccinated on that occasion, without, so far as appears, a word of objection from any of them. They all indicated by their conduct that they desired to avail themselves of the provisions made for their benefit. There was nothing in the conduct of the plaintiff to indicate to the surgeon that she did not wish to obtain a card which would save her from detention at quarantine, and to be vaccinated, if necessary, for that

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purpose. Viewing his conduct in the light of the circumstances, it was lawful; and there was no evidence tending to show that it was not. The ruling of the court on this part of the case was correct.

The plaintiff contends that, if it was lawful for the surgeon to vaccinate her, the vaccination, as alleged in the second count, was negligently performed. "There was no evidence of want of care or precaution by the defendant in the selection of the surgeon, or in the procuring of the virus or vaccine matter." Unless there was evidence that the surgeon was negligent in performing the operation, and unless the defendant is liable for this negligence, the plaintiff must fail on the second count.

Whether there was any evidence of negligence of the surgeon, we need not inquire, for we are of opinion that the defendant is not liable for his want of care in performing surgical operations. The only ground on which it is argued that the defendant is liable for his negligence is, that he is a servant engaged in the defendant's business, and subject to its control. We think this argument is founded on a mistaken construction of the duty imposed on the defendant by law. By the act of Congress of August 2, 1882, § 5, it is provided that "every steamship or other vessel carrying or bringing emigrant passengers, or passengers other than cabin passengers, exceeding fifty in number, shall carry a duly qualified and competent surgeon or medical practitioner, who shall be rated as such in the ship's articles, and who shall be provided with surgical instruments, medical comforts, and medicines proper and necessary for diseases and accidents incident to sea voyages, and for the proper medical treatment of such passengers during the voyage, and with such articles of food and nourishment as may be proper and necessary for preserving the health of infants and young children; and the services of such surgeon or medical practitioner shall be promptly given, in any case of sickness or disease, to any of the passengers, or to any infant or young child of any such passengers, who may need his services. For a violation of either of the provisions of this section the master of the vessel shall be liable to a penalty not exceeding two hundred and fifty dollars."

Under this statute it is the duty of ship-owners to provide a competent surgeon, whom the passengers may employ if they

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choose, in the business of healing their wounds and curing their diseases. The law does not put the business of treating sick passengers into the charge of common carriers, and make them responsible for the proper management of it. The work which the physician or surgeon does in such cases is under the control of the passengers themselves. It is their business, not the business of the carrier. They may employ the ship's surgeon, or some other physician or surgeon who happens to be on board, or they may treat themselves, if they are sick, or may go without treatment if they prefer; and if they employ the surgeon, they may determine how far they will submit themselves to his directions, and what of his medicines they will take and what reject, and whether they will submit to a surgical operation or take the risk of going without it. The master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant, engaged in their business and subject to their control as to his mode of treatment. They do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicines, and medical comforts, and have him in readiness for such passengers as choose to employ him. This is the whole requirement of the statute of the United States applicable to such cases, and if, by the nature of their undertaking to transport passengers by sea, they are under a liability at the common law to make provision for their passengers in this respect, that liability is no greater. It is quite reasonable that the owners of a steamship used in the transportation of passengers should be required by law to provide a competent person to whom sick passengers can apply for medical treatment, and when they have supplied such a person, it would be unreasonable to hold them responsible for all the particulars of his treatment, when he is engaged in the business of other persons in regard to which they are powerless to interfere.

The reasons on which it is held, in the courts of the United States and of Massachusetts, that the owners are liable for the negligence of a pilot in navigating the ship, even though he is appointed by public agencies, and the master has no voice in the selection of him, do not apply to this case. *The China*, 7 Wall. 53, 67. *Yates* v. *Brown*, 8 Pick. 23. The pilot is en-

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gaged in the navigation of the ship, for which, on grounds of public policy, the owners should be held responsible. The business is theirs, and they have certain rights of control in regard to it. They may determine when and how it shall be undertaken, and the master may displace the pilot for certain causes. But in England it has been held that even in such cases the owners are not liable. *Carruthers* v. *Sydebotham*, 4 M. & S. 98. *The Protector*, 1 W. Robinson, 45. *The Maria*, 1 W. Robinson, 95.

The view which we have taken of this branch of the case is fully sustained by a unanimous judgment of the Court of Appeals of New York, in *Laubheim* v. *De Koninglyke Stoomboot Co.* 107 N. Y. 228. See also *Secord* v. *St. Paul, Minneapolis, & Manitoba Railway*, 18 Fed. Rep. 221; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432. We are of opinion that on both parts of the case the rulings at the trial were correct.

The evidence which was excepted to, consisting of the printed quarantine regulations above referred to, and of testimony that only the steerage passengers holding a surgeon's certificate were allowed to land, all others being vaccinated by the port physician or detained at quarantine, was rightly admitted.

Exceptions overruled.

NEIL McNEIL *vs.* BOSTON CHAMBER OF COMMERCE.

Suffolk. March 17, 1891. — September 1, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Corporation — Oral Agreement — Building Committee — Power of Majority — Ostensible Authority.

In an action against a corporation for breach of an agreement to employ the plaintiff as the lowest bidder to erect a building, it appeared that a building committee of five, appointed by the defendant's directors to procure plans and specifications and to make all contracts therefor subject to the directors' approval, sent to selected builders plans and specifications with a "Notice to Bidders" attached, containing the terms of the bidding, and reserving the right

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to reject any and all bids. All the builders save one declining to submit bids, a conference was held between them and four of the committee. There was evidence, which was contradicted, that among other changes the committee orally agreed to accept the lowest bid, in case the building was erected substantially in accordance with the plans and specifications submitted, without reserving the right to reject bids in that case; and that the fifth member subsequently assented to this agreement. There was also evidence that the committee assumed to make changes in the terms of the competition at its own will, and that the directors, though informed of their proceedings, and holding monthly meetings as a board, did not object to their action, nor inform the bidders that they could not safely deal with the committee. *Held*, that a finding was warranted that such an oral agreement, varying the terms of the notice to bidders, was entered into by the committee; and that such an agreement was within their ostensible authority, and was valid.

A committee appointed by the directors of a private corporation to erect a proposed new building therefor may act by a majority.

CONTRACT, for breach of an alleged agreement to employ the plaintiff as the lowest bidder to erect the new Chamber of Commerce for the defendant, which agreement was entered into with him by a building committee appointed under the following vote, passed on October 9, 1889, by the defendant's stockholders: "Voted, that a committee of five be appointed by the chairman of this meeting, of whom the president shall be one, with full powers and authority to procure plans and specifications for a building, and make all contracts for the erection and completion of the same, subject to the approval of the directors." At the trial in this court, before *Holmes*, J., the jury, as requested by the judge, assessed the amount of the plaintiff's damages, and answered in the affirmative the following questions submitted to them:

"1. Did the committee on building purport to make a contract on behalf of the defendants by which they agreed to accept the lowest bid in case the building was built substantially in accordance with the plans and specifications submitted, without reserving the right to reject bids in that case? 2. If such contract was made, was it approved by the directors? 3. If such contract was made, was it within the ostensible authority of the committee? 4. Was the building, as finally contracted for, a building substantially in accordance with the said plans and specifications?"

The judge thereupon directed a verdict for the defendant, and reported the case for the consideration of the full court. If the

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direction was wrong, judgment was to be entered for the plaintiff for the amount of damages found by the jury.

The case was argued at the bar in March, 1891, and afterwards, in June following, was submitted on the briefs to all the judges.

R. M. Morse, Jr., (*C. E. Hellier* with him,) for the plaintiff.

R. Stone, for the defendant.

ALLEN, J. There was sufficient evidence to warrant the finding that the members of the committee on building, who were present at the conference of March 15, 1890, purported to make a contract on behalf of the defendant, by which they agreed to accept the lowest bid, in case the building was built substantially in accordance with the plans and specifications submitted, without reserving the right to reject bids in that case. The presiding justice, in his charge to the jury, called attention to the distinct difference in the testimony introduced on the one side and on the other. Five different builders had been selected by the architects and the building committee of the defendant, to whom written notices had been sent requesting bids for the defendant's proposed new building. To each of these a copy of the specifications was afterwards delivered, to which was attached a "Notice to Bidders," containing the terms of the bidding. After an examination of these documents, four of the selected builders declined to submit bids. A conference was thereupon invited and had between the builders and the building committee, at which there was a full discussion, and certain changes from the terms of the notice to bidders, and from the specifications, were agreed upon; and the builders agreed to submit bids. In respect to one particular, which has become material, the testimony is somewhat at variance respecting the result of this conference. The notice to bidders contained the two following provisions: "The work to be let to the lowest and best bidder, upon his executing to the Boston Chamber of Commerce a good and sufficient bond," etc. "The building committee of the Chamber of Commerce reserves the right to reject any and all bids." These provisions were the subject of discussion at the conference. All the witnesses agree that the words "and best" were to be struck out of the first clause. The plaintiff contends that the last clause was modified by an agreement

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that, in case the building should be erected substantially in accordance with the plans and specifications then submitted, the contract should be given to the lowest bidder among the five selected builders. The defendant contends that the committee only agreed to give the contract to the lowest bidder among the builders, if any of their bids under that competition should be accepted; but that they did not surrender the right to reject all of the bids and open a new competition. The plaintiff offered testimony tending to support his view, which was met by testimony offered by the defendant tending to support the contrary view. This testimony was all submitted to the jury, under instructions to which no exception was taken; and their verdict sustained the view contended for by the plaintiff.

There can be no doubt that it was competent in law for the parties by an oral agreement to vary the terms of the notice to bidders. This would be so, even if that notice had expressed the terms of a concluded contract. *Bartlett* v. *Stanchfield*, 148 Mass. 394. But it was only a proposal, which was never accepted as it originally stood; and it is not contended that there was anything in the nature of it to make it legally impossible for the final contract between the parties to be expressed and represented partly by the writing, and partly by additions or changes orally agreed to.

The defendant, however, contends that an examination of the evidence shows clearly that both parties to the conference understood that the terms on which bids should be invited were to be expressed in writing, and that they were then and there undertaking to do no more than to settle the terms in which a future invitation should be expressed; so that the notice to bidders, subsequently sent, must be taken to embody all the terms upon which the bids were to be made. This proposition is controverted by the plaintiff, and it does not seem to us that it can be said to be clearly established. No witness testified that there was to be a new written or printed notice embodying the new terms which had been settled upon. No one of the builders testified that he accepted the new notice as having the effect contended for by the defendant. On the other hand, the plaintiff testified that he did not think he read it, but did not remember. The specifications attracted his chief attention. Mr. Woodbury

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(another of the competing builders) testified that he did not remember whether there was any change in the notice to bidders. The several builders apparently proceeded with their estimates without waiting for any new statement of terms, and when it came, no one of them appears to have treated it as embodying all the terms of a new proposal for bids. Indeed, it plainly did not do so. One of the terms upon which there was no dispute was that the bids should be opened in the presence of all the bidders. There was a reason for insisting on this stipulation. The original notice to bidders provided for a delivery of the bids signed and sealed to the architects; but there was a distrust of the fairness of the architects. Mr. Lothrop, (still another of the five builders,) in his letter of March 12, 1890, declining to submit a bid under that notice, mentioned as one objection that the proposals should be opened in the presence of the bidders. At the conference this letter was read, and this stipulation, according to the testimony of the plaintiff and of Mr. Lothrop, was expressly agreed to, and no witness said anything to the contrary. All agreed that the letter was read, and its objections commented on, one by one. Nor does it appear that the terms of the new notice were fixed by the committee. The plaintiff asserts that it was prepared by one of the architects, who was not present at the conference. So far as it appears, the jury might properly find that both the committee and the builders rested upon what had been said and done at the conference.

The defendant further contends, that the building committee were joint agents of the defendant, and that the four members who were present at the conference of March 15 could not execute the power which was delegated to the whole committee, consisting of five members, jointly. It does not clearly appear that this point was taken at the trial, and it is not noticed in the charge of the presiding judge; but we have considered it. Where special agents are appointed to act jointly in the execution of a particular power, it has often been held that the action of all is necessary, in order to execute the power properly. This rule, however, is subject to many qualifications or exceptions. It is well understood that public agents may usually act by a majority. So also it has been settled that a majority of the directors of a corporation constitute a quorum, and a majority of the quorum

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may act. *Sargent* v. *Webster*, 13 Met. 497, 504. *Edgerly* v. *Emerson*, 23 N. H. 555. *Wells* v. *Rahway White Rubber Co.* 4 C. E. Green, 402.

Generally speaking, a committee of a corporation is subject to the same rules as the directors. *State* v. *Jersey City*, 3 Dutch. 493. *Junkins* v. *Union School District*, 39 Maine, 220. It would be very inconvenient in practice if a committee of this character, whose duties involve many acts in carrying out the general purpose of their appointment, could do nothing if a single member should be absent. There is sufficient precedent for holding that a majority may act, and such is the better rule. *Kupfer* v. *South Parish in Augusta*, 12 Mass. 185. *Damon* v. *Granby*, 2 Pick. 345. *Hayward* v. *Pilgrim Society*, 21 Pick. 270, 275, 277. *Haven* v. *Lowell*, 5 Met. 35, 42. *Weymouth & Braintree Fire District* v. *County Commissioners*, 108 Mass. 142. Moreover, there was evidence from which the jury might infer the assent of Mr. Speare, the absent member of the committee, to what was done by his associates. He went away, temporarily, to New Orleans, leaving the business in their hands. But on his return it expressly appears that he had a conference with them, or with some of them, and that they undertook to tell him what had been done. He denies, to be sure, that what they told him was in accordance with what the plaintiff contends, and what the jury have found to be the fact. The significant fact, however, that they undertook to tell him the result of the conference in respect to the right of the committee to reject any and all bids, is testified to by Mr. Speare. He says, "They told me they had expressly reserved that." If, in point of fact, the reservation of this right was accompanied with the qualification that they would accept the lowest bid in case they should build substantially in accordance with the plans and specifications submitted, the jury might think it a natural inference that at that time, before any controversy had arisen as to accepting the plaintiff's bid, Mr. Speare's associates told him all that had been agreed to on this head, though Mr. Speare had forgotten a part of it at the time of testifying. Mr. Lothrop's testimony tends to support such an inference. He said, "Before the meeting, I stated to Mr. Blaney (a member of the building committee) and Mr. Speare, that in my opinion the right to reject any and all bids passed [ceased?] after they had selected five

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from the many mechanics who had been recommended; and I was assured by them that if any one of these parties whom they had selected, and whom they supposed to be responsible, should be the lowest bidder, his bid would be accepted, and it was on that condition that I estimated, and I should not have figured on any other." He further testified, that in a private conversation, perhaps a different one, before that meeting, Mr. Speare said he would not consent to give up the right to reject all bids. It is further to be observed, that the chief reason assigned by the members of the committee who were present at the conference why they did not wish to give up the right to reject any and all bids was, that they were not willing to be bound absolutely; that the cost of the building might be too much for their means, so that a substantial change of plan might be necessary, or possibly the erection of the building given up entirely; and that the lowest bid might be entirely above the views of the committee, so that they were unwilling to consent to accept it unconditionally. Mr. Speare himself testified that he gave to Mr. Lothrop two reasons why the committee would not give up the right to reject all bids. The first was, that the lowest bid might be a sum which the directors would not think advisable to spend to erect a building. The second was, that it was the directors who would be the final arbitrators whether the committee should award the contract, and therefore the committee would have no right to give up the right to reject any and all bids. Mr. Lothrop, on the other hand, testified very explicitly and in detail, that while Mr. Speare in conversation had mentioned the names of the committee to him, he (Mr. Lothrop) did not know then, nor at the time of testifying, whether the action of the committee must be approved by any other board or body. Looking at all the testimony, if the objection now urged had been distinctly presented as a question of fact at the trial, it must have been left to the jury to determine whether Mr. Speare assented to the terms of the contract, by which, as found by the jury, his four associates purported to agree to accept the lowest bidder, in case the building should be built substantially in accordance with the plans and specifications submitted. Their finding that the contract was approved by the directors must have involved the finding that it was approved by Mr. Speare.

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And this finding might well be reached without implying any intentional misstatement on his part.

The remaining questions are whether there was sufficient evidence to warrant the second and third findings, or either of them, that such contract, if made by the committee, was approved by the directors, and was within the ostensible authority of the committee. If either of these was supported by the evidence, it is enough for the plaintiff's purposes, and most, if not all, of the evidence relating to the second finding bears also upon the third. The plaintiff contends that it was within the ostensible authority of the committee to fix the terms upon which it would receive bids, and to make the agreement which is embodied in the first finding of the jury without any reference to an approval by the directors. He urges that this was within the ordinary province of a building committee; and that in this instance the directors knew that there was to be a competition for bids, that this competition was to be limited to five selected builders, and that the committee would fix the terms of it; that the directors were well aware that the committee was going on to attend to all these matters; that a vote had already been passed by the directors, authorizing the committee to make leases in the new building; that they also knew that the architects had been selected; that the plans were hanging up in the office; that the erection of the new building was the most important subject which the board of directors or the Chamber of Commerce had under consideration during this period; that it was a subject of constant talk; and that no director ever objected to the committee's undertaking to fix the terms of the competition among the builders, or questioned its power to do so, till after a letter from the plaintiff's attorney threatening an action at law. There was testimony in support of these various propositions. So far as appears, no one of the bidders doubted the power of the committee to act in the matter. The committee assumed to make changes in the terms of competition at its own will. There is nothing to show any suggestion to any of the bidders in respect to the need of consulting the directors, except in Mr. Speare's testimony, already referred to, of his conversation with Mr. Lothrop. The notice to bidders held out the building committee as having the power to act in the premises. No mention of the

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directors was made in it. The board of directors had regular monthly meetings. Mr. Speare was president of the board, and was upon the building committee. He testified, "It was known to the directors, in a general way, that specifications, notice to bidders, and other details preliminary to obtaining bids and making the contract, were being attended to by the committee and the architects." "Was it not the understanding of the directors that there was to be a competition?" "Yes, sir." "How was that known to them?" "Simply in a general way; I presume at a meeting of the directors I had told them." He added later, that the board of directors knew that the committee was trying to get bids, and that no effort was made to inform bidders that they could not safely deal with the committee. According to the strict letter of the original vote, the committee could not even procure plans and specifications except subject to the approval of the directors. It was allowed, however, not only to procure plans and specifications, but to employ the architects without formally consulting the directors.

Without dwelling further upon details of evidence, the jury might properly find that the committee itself believed that it was authorized to go on, as it did, without consulting the directors as to the details, and that the directors were aware in a general way of what the committee was doing. It seems to us that the jury, as a result of the whole testimony, might properly come to the conclusion that the contract was within the ostensible authority of the committee, and that the bidders had a right to assume that the defendant would be bound by the contract of the committee as to the terms of the bidding.

The doctrine as to ostensible authority is thus stated in *Bronson* v. *Chappell*, 12 Wall. 681, 683: "Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner." Circumstances may warrant an inference that acts of a committee, openly done and extending over a considerable period of time, were known and assented to by those who appointed the committee. The directors represented the corporation, and if

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the directors knew and by silence acquiesced in the acts of the committee, that is enough. The vote of the stockholders would show what in the first instance was the actual authority of the committee, but the course of the directors might be considered in determining its ostensible authority. A secret or unknown limitation of authority imposed by the stockholders would not control an apparent authority from the directors, since the business was within the scope of the general authority of directors. This was clearly left to the jury by the presiding judge, in terms to which the defendant did not except, and which appear to be unexceptionable. The decisions cited by the plaintiff afford various illustrations of the application of the rule of law as to apparent authority in an agent. The rule itself is not open to doubt. *Fay* v. *Noble*, 12 Cush. 1, 17, 18. *Lester* v. *Webb*, 1 Allen, 34. *Ayer* v. *R. W. Bell Manuf. Co.* 147 Mass. 46. *Insurance Co.* v. *McCain*, 96 U. S. 84. *Mining Co.* v. *Anglo-Californian Bank*, 104 U. S. 192. See also *Case* v. *Bank*, 100 U. S. 446, 454. The defendant does not now insist that the evidence did not warrant the fourth finding of the jury.

The result is, that there should be,

Judgment for the plaintiff on the finding.

ELIAS R. HUNNEWELL *vs.* J. W. DUXBURY & others.

Suffolk. March 17, 1890. — September 2, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Corporation — Certificate — Fraudulent Representations — Action of Deceit.

If the officers of a foreign corporation execute the certificate required by the St. of 1884, c. 330, § 3, to enable the corporation to file it with the commissioner of corporations in order that the corporation may do business in this State, an individual who finds it there on file, and is induced by misstatements contained therein to take the promissory notes of the corporation, cannot maintain an action of deceit therefor against such officers.

TORT, for fraudulent representations alleged to be made by the defendants as directors of the Electric Advertising Company.

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The defendants' answer contained a demurrer to the second count of the declaration, which was overruled in the Superior Court; and the defendants appealed to this court. The case was then tried before *Pitman*, J., and, after a verdict for the plaintiff, the defendants alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in March, 1890, and afterwards, in June, 1891, was submitted on the briefs to all the judges.

C. R. Darling & W. S. Slocum, (*W. F. Slocum* with them,) for the defendants.

F. McIntire, (*J. Woodbury* with him,) for the plaintiff.

BARKER, J. The action is tort for deceit, in inducing the plaintiff to take notes of a corporation by false and fraudulent representations, alleged to have been made to him by the defendants, that the capital stock of the corporation, amounting to $150,000, had been paid in, and that patents for electrical advertising devices, of the value of $149,650, had been transferred to it.

From the exceptions, it appears that the corporation was organized in January, 1885, under the laws of Maine, and engaged in business in Massachusetts; that it filed with the commissioner of corporations a certificate containing the above statements, dated August 11, 1885, as required by the St. of 1884, c. 330, § 3,* signed by the defendants, with a jurat stating that on that

* The St. of 1884, c. 330, is an act concerning foreign corporations, except foreign insurance companies, having a usual place of business in this Commonwealth. Section 3 is as follows: "Every such company before transacting business in this Commonwealth shall file with said commissioner a copy of its charter or certificate of incorporation, and a statement of the amount of its capital stock, and the amount paid in thereon to its treasurer, and if any part of such payment has been made otherwise than in money the statement shall set forth the particulars thereof, and said statement shall be subscribed and sworn to by its president, treasurer, and by a majority of its directors or officers having the powers usually exercised by directors. All such companies now doing business in this Commonwealth shall file such copy and such statement on or before the first day of October next, provided such business is thereafter continued. Every officer of a corporation which fails to comply with the requirements of this act, and every agent of such corporation who transacts business as such in this Commonwealth shall for such failure be liable to a fine not exceeding five hundred dollars; but such failure shall not affect the validity of any contract by or with such corporation. Every such company shall pay into the treasury ten dollars for filing the copy of its charter, and five dollars for filing the statement required by this section."

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date they had severally made oath that the certificate was true, to the best of their knowledge and belief; that before the plaintiff took the notes the contents of this certificate had been communicated to him by an attorney whom he had employed to examine the records; and that he relied upon its statements in accepting the notes. There was no other evidence of the making of the alleged representations.

The main question, which is raised both by the demurrer to the second count of the declaration and by the exceptions, is whether the plaintiff can maintain an action of deceit for alleged misstatements contained in the certificate. In the opinion of a majority of the court this question should have been decided adversely to the plaintiff. The execution by the defendants of the certificate to enable the corporation to file it under the St. of 1884, c. 330, § 3, was too remote from any design to influence the action of the plaintiff to make it the foundation of an action of deceit.

To sustain such an action, misrepresentations must either have been made to the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains.

This certificate was not communicated by the defendants, or by the corporation, to the public or to the plaintiff. It was filed with a State official for the definite purpose of complying with a requirement imposed as a condition precedent to the right of the corporation to act in Massachusetts. Its design was not to procure credit among merchants, but to secure the right to transact business in the State.

The terms of the statute carry no implication of such a liability. Statutes requiring similar statements from domestic corporations have been in force here since 1829, and whenever it was intended to impose a liability for false statements contained in them there has been an express provision to that effect; and a requisite of the liability has uniformly been that the person to be held signed knowing the statement to be false. St. 1829, c. 53, § 9. Rev. Sts. c. 38, § 28. Gen. Sts. c. 60, § 30. St. 1870, c. 224, § 38, cl. 5. Pub. Sts. c. 106, § 60, cl. 5. To hold that the St. of 1884, c. 330, § 3, imposes upon those officers of a foreign

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corporation who sign the certificate, which is a condition of its admission, the added liability of an action of deceit, is to read into the statute what it does not contain.

If such an action lies, it might have been brought in many instances upon representations made in returns required of domestic corporations, and yet there is no instance of such an action in our reports. In *Fogg* v. *Pew*, 10 Gray, 409, it is held that the misrepresentations must have been intended and allowed by those making them to operate on the mind of the party induced, and have been suffered to influence him. In *Bradley* v. *Poole*, 98 Mass. 169, the representations proved and relied on were made personally by the defendant to the plaintiff, in the course of the negotiation for the shares the price of which the plaintiff sought to recover. *Felker* v. *Standard Yarn Co.* 148 Mass. 226, was an action under the Pub. Sts. c. 106, § 60, to enforce a liability explicitly declared by the statute.

Nor do we find any English case which goes to the length necessary to sustain the plaintiff's action. The English cases fall under two heads: 1. Those of officers, members, or agents of corporations, who have issued a prospectus or report addressed to and circulated among shareholders or the public for the purpose of inducing them to take shares. 2. Those of persons who, to obtain the listing of stocks or securities upon the stock exchange in order that they may be more readily sold to the public, have made representations to the officials of the exchange, which in due course have been communicated to buyers. *Bagshaw* v. *Seymour*, 32 L. T. 81. *Bedford* v. *Bagshaw*, 4 H. & N. 538. *Watson* v. *Earl of Charlemont*, 12 Q. B. 856. *Clarke* v. *Dickson*, 6 C. B. (N. S.) 453. *Jarrett* v. *Kennedy*, 6 C. B. 319. *Campbell* v. *Fleming*, 1 A. & E. 40. *Peek* v. *Derry*, 37 Ch D. 541, and 14 App. Cas. 337. *Angus* v. *Clifford*, [1891] 2 Ch. 449. In these cases the representations were clearly addressed to the plaintiffs among others of the public or of a class, and were plainly intended and calculated to influence their action in the specific matter in which they claimed to have been injured. So, too, in the American cases relied on to support the action. *Morgan* v. *Skiddy*, 62 N. Y. 319. *Terwilliger* v. *Great Western Telegraph Co.* 59 Ill. 249. *Paddock* v. *Fletcher*, 42 Vt. 389. The numerous cases cited in the note to *Pasley* v. *Free-*

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man, in 2 Smith's Lead. Cas. (9th Am. ed.) 1320, are of the same character.

In the case at bar, the certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the State a specific right, which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents and be induced by them to take the notes. It is not such a representation, made by one to another with intent to deceive, as will sustain the action. Its statements are in no fair sense addressed to the person who searches for, discovers, and acts upon them, and cannot fairly be inferred or found to have been made with the intent to deceive him.

This view of the law disposes of the case, and makes it unnecessary to consider the other questions raised at the trial.

Demurrer and exceptions sustained.

JAMES S. ADAMS *vs.* ANNE T. ADAMS & others.

Suffolk. November 20, 21, 1890. — September 2, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Divorce in another State — Validity of subsequent Marriage — Legitimacy.

The fact that a marriage has taken place in another State on the faith of a previous divorce there does not preclude an inquiry by the courts of this State into the validity of the divorce, or a denial of the validity of the marriage if the divorce is one that would be decreed void if it were directly in issue.

The California Civil Code, in § 84 legitimating "children begotten before the judgment" annulling a marriage, and in § 1387 legitimating the issue of marriages null in law, relate to children born after the marriage, and cannot be taken to enlarge the meaning of § 215, legitimating by a subsequent marriage children born before wedlock.

A testator, resident in this State, bequeathed property to the "present wife" of his brother, "for the benefit of herself and all the children" of such brother. Thereafter the brother went to California and obtained a divorce before resid-

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ing there the requisite time, although the record of divorce proceedings recited that he had done so, and subsequently married there a woman by whom he had had an illegitimate son. *Held*, on a bill in equity by such son to establish his rights under the will, that the validity of the divorce might be inquired into, notwithstanding the recitals in the record; that the marriage was void, and did not legitimate the plaintiff; and that the plaintiff was not entitled to take under the will.

BILL IN EQUITY to obtain a share of the income of a trust fund. *Allen*, J. reported the case for the consideration of the full court.

The case was argued at the bar in November, 1890, and afterwards, in September, 1891, was submitted to all the judges except *Field*, C. J. and *Barker*, J.

H. R. Bailey, for the plaintiff.

J. Fox, (*R. M. Morse, Jr.* with him,) for the defendants.

HOLMES, J. This is a bill in equity by which the plaintiff seeks to establish his right to a share in a fund left by the will of Seth Adams, of Newton, Massachusetts, to the "present wife" of his brother, Charles W. Adams, "for the benefit of herself and all the children of said Charles in equal proportions." The testator died in this State on December 7, 1873, and the will was dated February 15, 1872. The question is whether the plaintiff is one of the children within the meaning of the will. The wife referred to is admitted to be the defendant Anne T. Adams, who was married to Charles W. in Maine, in 1854, he then being a resident of New York. The plaintiff is the child of Charles W. Adams and Hannah Phillips, was born in California on August 28, 1881, and was then illegitimate. At that time Charles W. Adams's domicil was in Texas. In October, 1881, Charles W. Adams changed his domicil to California, and on December 8, 1881, he began an action there for divorce against the above mentioned Anne, and got a decree on April 13, 1882. It is found that he had not been a resident of the State for six months next preceding the commencement of the action, as required by the California Civil Code, § 128, and that for this reason the court had no jurisdiction of the action, but that the court was imposed upon by Charles W. Adams. We may also mention, that it is found that the wife of Charles W. Adams was then residing in Massachusetts, and had no actual notice of the action, and that it might be a question, if material, whether her domicil followed that of her husband. California

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Civil Code, § 129. *Burlen* v. *Shannon*, 115 Mass. 438, 447, 448. On April 20, 1882, Charles W. Adams married Hannah Phillips in California, then having his domicil there, and after the marriage recognized the plaintiff as his son. By the law of California a child born before wedlock becomes legitimate by the subsequent marriage of its parents. Civil Code, § 215. The law of Texas is similar, if the child is recognized by the father. Rev. Sts. § 1656 (1879).

The word "children" in a Massachusetts will means legitimate children. *Kent* v. *Barker*, 2 Gray, 535, 536. Probably the meaning would be the same, even if the parents referred to and the child were domiciled in a State where illegitimate children were recognized as children for some purposes. *Lincoln* v. *Perry*, 149 Mass. 368, 373, 374. But we do not need to consider this at length, as it does not appear that the law of California or of Texas would recognize the plaintiff as the child of Charles W. Adams for the present purpose unless he were legitimated, as Charles W. Adams in any case was only domiciled in California for a short time, long after the testator's death, and after the birth of his child, and died domiciled in Massachusetts. The plaintiff's case is put wholly upon his having been legitimated. We assume for the purposes of our decision, that, if he has been legitimated, he is entitled to a share under the will. *Loring* v. *Thorndike*, 5 Allen, 257. *Sleigh* v. *Strider*, 5 Call, 439. *In re Andros*, 24 Ch. D. 637. We may as well add here, that, if the Texas domicil of Charles W. Adams at the time of the birth of his son was material, (*Ross* v. *Ross*, 129 Mass. 243, 256, and *In re Grove*, 40 Ch. D. 216,) no difference based on that fact, and favorable to the plaintiff, has been called to our attention. We shall speak only of the law of California in dealing with this part of the case. We shall not consider whether, if it were necessary to satisfy the requirements of the Texas statute, a marriage in California would do so.

It may be assumed that the California statute to which we have referred (Civil Code, § 215) requires a valid marriage to legitimate an earlier born child. *Loring* v. *Thorndike*, 5 Allen, 257, 263, 269. *Greenhow* v. *James*, 80 Va. 636, 641. For Charles W. Adams's marriage to be valid it was necessary that he should have obtained a valid divorce. But if we should assume that

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the decree of divorce was valid in California, so that Charles W. Adams had a capacity to marry there, and that his marriage conferred the status of a legitimate child upon his son by the law of that State, we should encounter doubts like those expressed by Lord Colonsay, in *Shaw* v. *Gould*, L. R. 3 H. L. 55, 97, whether at any distance of time we were to reopen the inquiry into the circumstances of Charles W. Adams's resort to the California court. The California record shows that the court there found that Charles W. Adams had been a resident of the State for the necessary time. There is color in the California decisions put in evidence for the argument that this finding could not be impeached collaterally in California, and thus that the case supposed is the case before us.

Taking the case this way for a moment, we still are unable to decide it in favor of the plaintiff. The rule that the status of the domicil is the status everywhere must yield when the status is constructed on principles which are contrary to those which are generally recognized, or which can be admitted by the law of the forum resorted to. See *Ross* v. *Ross*, 129 Mass. 243. We should agree with the English decisions so far as this, that the fact that a marriage has taken place on the faith of a previous divorce does not preclude an inquiry by the courts of another State into the capacity of the divorced party, and thus into the validity of the divorce, or a denial of the validity of the marriage if the divorce is one which would be decreed void if it were directly in issue. A purely voluntary contract of marriage cannot be allowed to impart a conclusive character to a decree which before could have been examined. *Smith* v. *Smith*, 13 Gray, 209, 210. *Shaw* v. *Gould*, L. R. 3 H. L. 55. *Shaw* v. *Attorney General*, L. R. 2 P. & D. 156. *Briggs* v. *Briggs*, 5 P. D. 163.

The present case offers remarkably little ground for hesitation in going into this inquiry. Marriage in California is, or may be, a pure matter of private contract, entered into without intervention of the State except for purposes of registration. Civil Code, §§ 55, 75, 78. *Graham* v. *Bennet*, 2 Cal. 503. The mother's rights are not in question, and if they were, she did not stand at all in the position of a purchaser for value without notice. She is found to have known all the facts, and her belief in Charles W. Adams's capacity to contract marriage was simply an opinion

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about California law. (We are not now considering the conditions of a putative marriage, as to which different views have been expressed. *Glass* v. *Glass*, 114 Mass. 563, 566. *Shaw* v. *Gould*, L. R. 3 H. L. 55, 97. *Succession of Buissiere*, 41 La. An. 217, 220, 221. *Harris* v. *Harris*, 85 Ky. 49.) The plaintiff is claiming a purely gratuitous benefit as an incidental result of the proceedings in California, at the expense of other children who were not parties to any of those proceedings, or entitled to be heard at any stage of them, but who nevertheless are to be precluded from denying their validity.

If the validity of the divorce were immediately in issue, it could be impeached here for want of jurisdiction, notwithstanding the recitals in the record, and those recitals could be contradicted by parol evidence. *Sewall* v. *Sewall*, 122 Mass. 156, 161. *Cummington* v. *Belchertown*, 149 Mass. 223, 225. *Thompson* v. *Whitman*, 18 Wall. 457. See *Bowler* v. *Huston*, 30 Grat. 266; *Mitchell* v. *Ferris*, 5 Houst. 34; *Eager* v. *Stover*, 59 Misso. 87. For instance, if Charles W. Adams had married Hannah Phillips in this State and had been indicted for polygamy. *People* v. *Dawell*, 25 Mich. 247. *Van Fossen* v. *State*, 37 Ohio St. 317, 320. See *People* v. *Baker*, 76 N. Y. 78. Or even in a proceeding between the parties to the divorce, if the one raising the objection had not appeared in that cause, and was not domiciled in the State where it was granted. *Reed* v. *Reed*, 52 Mich. 117, 121. *Cross* v. *Cross*, 108 N. Y. 628. See *Chaney* v. *Bryan*, 15 Lea, (Tenn.) 589; *Leith* v. *Leith*, 39 N. H. 20, 41. So *a fortiori* where the question is raised, as here, by third persons whose rights are concerned, and who were not parties to or entitled to be heard in the divorce suit. See *Gregory* v. *Gregory*, 78 Maine, 187, 190; *Neff* v. *Beauchamp*, 74 Iowa, 92, 94; *O'Dea* v. *O'Dea*, 101 N. Y. 23; *Cummington* v. *Belchertown*, 149 Mass. 223; *Shaw* v. *Gould*, L. R. 3 H. L. 55. In *Hood* v. *Hood*, 11 Allen, 196, the fact of domicil was tried between the original parties for the purpose of determining the jurisdiction of an Illinois divorce, and in *Hood* v. *Hood*, 110 Mass. 463, it was the Massachusetts, not the Illinois decree, which was held conclusive on third persons, they offering evidence only to impeach the Illinois decree. See also *Burlen* v. *Shannon*, 115 Mass. 438, 445, 449; Pub. Sts. c. 146, § 41.

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There is no doubt that the requirement of six months' residence goes to the jurisdiction of the court. The finding of the judge on this point is confirmed, not only by the plain effect of the California statute, but by the express statement of the Supreme Court of that State, and by its intimation that a divorce granted without that prerequisite would not be binding in any other State. *Bennett* v. *Bennett*, 28 Cal. 599, 601. *People* v. *Dawell*, 25 Mich. 247, 263, 264.

But although we have made the assumption for a moment, we by no means are prepared to concede that, if the present case arose in California, under a California will, it would be decided differently there. The universal effect of a judgment *in rem* in establishing or changing a status or title, whether given to it by statute or by the tradition of the courts, rests on the practical necessity of the case, because the effect is of a nature to concern strangers to the proceedings. It would be inconvenient for parties to be divorced as between themselves, and yet married towards the world. The same convenience makes it desirable that the effect should be the same wherever the question arises, whether within the jurisdiction or without it, and therefore, in the case of a decree which would be void outside the jurisdiction, that it should not be held conclusive within it. The decree if binding in California would be binding everywhere. *Cheever* v. *Wilson*, 9 Wall. 108. It is desirable, at least, that the converse rule should be applied, and that a decree void elsewhere should not be held binding there. We are aware that some of the cases which we have cited, and others which we have not cited, contemplate the possibility of a divorce which shall be valid only as to the plaintiff within the jurisdiction. But especially in this country, where changes of residence from State to State are frequent, every court must strive so far as possible to bring the local view of a citizen's status into accord with that which would prevail generally elsewhere.

We have tried to show that the decree before us would be regarded as void outside of the jurisdiction, and void on the ground that the condition precedent attached by a California statute to the right of the court to take jurisdiction had not been complied with. The question is whether the statute has a less effect within the State. No conclusive evidence of the law of California

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upon this point has been called to our attention. If the plaintiff had been rightly in court, and the objection had been that the defendant had not been duly served, it may be that, if the record showed a proper publication, it could not be contradicted. *In re Newman*, 75 Cal. 213, 220. But perhaps even this is doubtful, in view of some of the decisions earlier cited, and however it may be, a distinction has been suggested between a total want of jurisdiction and a failure to get jurisdiction of the person of the defendant in a case which is rightly in court. *People* v. *Dawell*, 25 Mich. 247, 256. See *Henderson* v. *Staniford*, 105 Mass. 504, 506; *Whitwell* v. *Barbier*, 7 Cal. 54, 63, 64. We feel at liberty to assume the law of California to be in accordance with that generally received elsewhere, and to consider the question on principle.

The argument for the conclusiveness of the decree in California would seem to be, that the parties to a domestic judgment showing jurisdiction on the face of the record cannot impeach it collaterally. *Hendrick* v. *Whittemore*, 105 Mass. 23. *McCormick* v. *Fiske*, 138 Mass. 379. Freeman, Judgments, §§ 131, 134. And that if a judgment *in rem* is operative as between the parties while it stands, it must be effectual to determine their status as to third persons, although not parties, for reasons already given. *In re Newman*, 75 Cal. 213, 220. *Hood* v. *Hood*, 110 Mass. 463, 465. *Brigham* v. *Fayerweather*, 140 Mass. 411, 413.

But if the judgment is thus binding to all intents and purposes in California, it would be binding elsewhere, which, as has been shown, is not the law. In New York this consideration has been adduced as a reason for the rule prevailing there, that a domestic record may be impeached collaterally for want of jurisdiction, even by a party. *Ferguson* v. *Crawford*, 70 N. Y. 253, 261, 262. Whether the rule as to parties be regarded as an anomaly established on the principle *Communis error facit jus*, or as a mere rule of procedure, that those who have it in their power to reverse a judgment must do so if they do not want to be bound by it, as possibly may be inferred from some of the cases, *Hendrick* v. *Whittemore*, 105 Mass. 23, 28, the conclusion cannot be admitted that those who have not that power are also bound, if the judgment is *in rem*, to admit the change of status which it purports to effect. Consider what would be the result. In a great ma-

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jority of divorces neither party wishes to disturb the decree. If their acquiescence should be allowed to have the effect supposed, third persons may be affected in their property and in their most sacred personal rights by the interested action of others, without ever having had a chance to be heard. The cases are few, and we are aware of no binding authority. But in *Perry* v. *Meddowcroft*, 10 Beav. 122, 137, an infant was allowed to impeach a domestic sentence of nullity collaterally for collusion, although the sentence operated *in rem*, and bastardized him if it stood. *Harrison* v. *Southampton*, 22 L. J. (N. S.) 372. *Meddowcroft* v. *Huguenin*, 4 Moore, P. C. 386, 398. We cannot doubt that, if the fraud on the court had concerned its jurisdiction rather than the merits, Lord Langdale would have been at least equally ready to hear the evidence. *Cavanaugh* v. *Smith*, 84 Ind. 380. Yet the parties to the collusive decree were bound by it. *Greene* v. *Greene*, 2 Gray, 361, 362. *Nichols* v. *Nichols*, 10 C. E. Green, 60, 65. We have confined our citations mainly to cases of divorce and judgments *in rem*. But where there has been an execution sale under a judgment *in personam*, there is a difficulty not unlike that which arises with regard to judgments *in rem* in allowing the validity of the judgment to be disputed by third persons, for the purpose of destroying the purchaser's title. Yet it has been held that this may be done. *Safford* v. *Weare*, 142 Mass. 231.

We shall not consider further whether this judgment was not absolutely void on the facts reported, and whether, if so, the record could be contradicted by the parties to it on what has been declared in California to be a "fundamental rule that no court can acquire jurisdiction by the mere assertion of it, or by deciding that it has it." *McMinn* v. *Whelan*, 27 Cal. 300, 314.

We are of opinion, for the reasons which we have given, that the validity of the divorce granted Charles W. Adams is open to contradiction in this suit, that the divorce was void and ineffectual as against his legitimate children, and that therefore his marriage with the plaintiff's mother was void, and did not legitimate the plaintiff in such a sense as to entitle him to set up a claim in competition with the legitimate children under a Massachusetts will.

Another and distinct argument has been drawn from another California statute, which provides that, when a marriage is an-

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nulled on the ground that a former husband or wife was living, children begotten before the judgment are legitimate. Cal. Civil Code, § 84. The California and Texas statutes also provide that the issue of marriages null in law shall be legitimate. Cal. Civil Code, § 1387. Texas Rev. Sts. § 1656.

The Texas statute may be laid on one side. For, even if we should hold that the Texas law imparted to the plaintiff his capacity for legitimation, which, under the facts of this case, we do not intimate, still, subject to the qualifications heretofore stated, the effects of his parents' marriage upon him must be determined by the law of California, where it took place, and where they and he then were domiciled. We lay on one side, therefore, without further remark, a dictum in a decision by the Supreme Court of Texas, that children born before the parents entered into a void marriage would be legitimated so as to take as children under a Texas will. *Carroll* v. *Carroll*, 20 Texas, 731, 745, 746.

We see no ground for construing the California acts as applying to any children except those born after the void ceremony has been gone through with. They alone can be described as issue of the marriage, according to the express words of § 1387. *Greenhow* v. *James*, 80 Va. 636, 638. They alone fall within the obvious reasons for the statute and the earlier Spanish law, from which it would seem that the statute may have been derived, according to the exposition in another Texas case. *Smith* v. *Smith*, 1 Texas, 621, 629. If we assume that § 84 applies where there has been no judgment annulling the marriage, the general words, "children begotten before the judgment" must be confined to children born after the marriage, in view of § 1387. Neither § 84 nor § 1387, nor both together, can be taken to enlarge the meaning of § 215, discussed at the beginning of this opinion, so that a void marriage shall legitimate children previously born. The view which we take seems to be that of the Supreme Court of California, so far as they have expressed an opinion. *Estate of Wardell*, 57 Cal. 484, 491. See also *Watts* v. *Owens*, 62 Wis. 512, 517; Fraser, Parent and Child, (2d ed.) 28. We have found no case favoring a different construction, except the few words in *Carroll* v. *Carroll*, 20 Texas, 731, 746.

Bill dismissed.

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CAROLINE E. DODGE *vs.* BOSTON AND PROVIDENCE RAILROAD CORPORATION.

Suffolk. January 27, 1891. — September 2, 1891.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Railroad — Deed of Right of Way — "Family" — Limitation of Grant.

The grandchild of the grantor of a right of way to a railroad corporation, by a deed which provides that "the said grantor and his family shall have and enjoy the right of free passage" in its cars over the railroad "so long as the land and appurtenances hereinbefore described shall continue to be used" for railroad purposes under its charter, after ceasing to be a member of such grantor's household, is not entitled to a free pass over the railroad as one of his family.

BILL IN EQUITY, filed in this court for specific performance. *Field, C.* J. dismissed the bill; and the plaintiff appealed to the full court.

The case was argued at the bar in January, 1891, and afterwards, in September following, was submitted on the briefs to all the judges except *Holmes*, J.

C. E. Dodge, pro se.

J. H. Benton, Jr., for the defendant.

LATHROP, J. This is a bill in equity, filed on February 23, 1888, for specific performance of an agreement alleged to have been made by the defendant, in 1836, with John C. Dodge, the plaintiff's grandfather. The case was heard before a single justice of this court, upon the pleadings and evidence, and comes before us on the plaintiff's appeal from a decree dismissing the bill.

From the evidence it appears that the defendant corporation, on December 23, 1833, took by the right of eminent domain a parcel of land belonging to John C. Dodge in the town of Attleborough, and, having constructed its road over the land so taken, began to run trains of cars from Boston to Providence, on August 23, 1835. By deed dated September 1, 1836, and acknowledged on May 6, 1837, John C. Dodge, conveyed a right of way over the land so taken to the defendant. After the description

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of the premises conveyed, and before the habendum, were the following clauses: "It being understood and agreed by and between the said parties to this deed that the said corporation shall erect, make, and keep up all necessary fences between the lands of the grantor and the land taken for said railroad. And it is further agreed by and between the said parties to this deed, and the said corporation by the acceptance of this deed do covenant and agree to and with the said grantor, for themselves, their successors and assigns, that the said grantor and his family shall have and enjoy the right of free passage on and over said railroad in the cars of said corporation, their successors and assigns, so long as the land and appurtenances hereinbefore described shall continue to be used as a railroad, or for railroad purposes, under the charter of said corporation."

It further appears from the evidence, that in 1836 John C. Dodge had nine sons living with him; that in 1854 or 1855 he left this Commonwealth and did not return to it, and died in January, 1866; that the plaintiff's father, a son of John C. Dodge, was living with him in 1836, and continued to live with him from that time until about a year after his own marriage in 1846; that he left the Commonwealth in 1850, and returned to it in 1885 or 1886, and now resides here.

In regard to the plaintiff, the testimony shows that she was born in 1854 or 1855, in the State of Pennsylvania; that when she was a child she lived for some time in the family of her grandfather after he left this Commonwealth; and that she returned here with her father in 1885 or 1886, and has since lived with him.

The evidence was somewhat conflicting on the question whether the defendant had, by its acts, recognized the plaintiff as a person entitled to ride free over its road. It does appear that when she was a child she occasionally went over the road, when accompanied by her father or mother, and was allowed to do so; and that, since she came of age, passes had been occasionally given to her, she claiming the right to have them, but, as she states in her brief, "usually on objection by the officers of the company." On this state of the evidence, we need not consider how far the defendant would be bound by what the plaintiff contends is the practical construction put upon the deed by

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the officers of the defendant corporation. We find nothing in the evidence to show conclusively that what was accorded to her after she came of age was other than as a favor.

We pass, therefore, to the consideration of the construction of the deed. The word "family" has several meanings. Its primary meaning is the collective body of persons who live in one house and under one head or management. Its secondary meaning is those who are of the same lineage, or descend from one common progenitor.

Unless the context manifests a different intention, the word "family" is usually construed in its primary sense. In *The King* v. *Darlington*, 4 T. R. 797, under the Settlement Act of 8 & 9 Wm. 3, c. 30, which provided for the granting of a certificate to a poor person who wished to remove from his own parish to another, and that the latter parish should be obliged "to receive and provide for the person mentioned in the said certificate, together with his or her family," it was held that the certificate did not extend to a grandchild of the person receiving it, who lived with his father, but not with his grandfather. Lord Kenyon, C. J. said: "In common parlance, the family consists of those who live under the same roof with the *pater familias;* those who form (if I may use the expression) his fireside. But when they branch out, and become the heads of new establishments, they cease to be part of the father's family." See also *Oystead* v. *Shed*, 13 Mass. 520; *Bowditch* v. *Andrew*, 8 Allen, 339; *Poor* v. *Humboldt Ins. Co.* 125 Mass. 274; *Bates* v. *Dewson*, 128 Mass. 334; *Bradlee* v. *Andrews*, 137 Mass. 50; *Phelps* v. *Phelps*, 143 Mass. 570.

The plaintiff, however, contends that the words "so long as the land and appurtenances hereinbefore described shall continue to be used as a railroad, or for railroad purposes, under the charter of said corporation," imply perpetual succession, and must necessarily include all the descendants of John C. Dodge.

But we are of opinion that these words are words of limitation of the grant, and not words extending the meaning of the word "family."

By the charter of the defendant corporation, the Commonwealth reserved the right, at any time after twenty years from the opening for use of the road, to purchase of the corporation

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its railroad, and its franchise, property, and privileges. St. 1831, c. 56, § 12. The words "under the charter of said corporation" were, therefore, necessary to limit the agreement to carry to the time the corporation might have the power to use the land for railroad purposes.

So, too, the words "used as a railroad, or for railroad purposes," were a necessary and proper limitation of the contract to carry. If the location of the road were changed, and the land conveyed by Dodge should revert to him, the parties would naturally provide that the contract to carry should be at an end.

Other contingencies might also happen. By the St. of 1830, c. 81, passed on March 11, 1831, the charter of the defendant corporation could be repealed at the pleasure of the Legislature; its franchise might be forfeited for misuser or non-user, or it might be surrendered.

All these considerations show that the words in question were words of limitation, and did not extend the word "family" so as to include the descendants of John C. Dodge to the remotest generation. We are of opinion, therefore, that the plaintiff, after she ceased to be a member of her grandfather's household, was not entitled to a free pass over the road of the defendant as one of his family. *Decree dismissing the bill affirmed.*

WILLIAM G. FISH *vs.* WILLIAM C. FISKE.

Suffolk. March 3, 1891. — September 2, 1891.

Present: HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Equity Practice — Waiver — Creditor's Bill — Lien — Insolvency of Defendant.

The filing of an agreed statement of facts by the parties to a bill in equity, pending an appeal, and their request that the cause be reserved for the full court on the appeal, the pleadings subsequent thereto, and such agreed facts, are a waiver of all questions of form in regard to the proceedings previously had and the manner of bringing the case before the full court.

The plaintiff in a bill in equity under the Pub. Sts. c. 151, § 2, cl. 11, and the St. of 1884, c. 285, § 1, to compel the defendant to sell his seat in a stock exchange and apply the proceeds in payment of the plaintiff's claim, acquires no lien

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thereon, and if, pending an appeal, the defendant sells the same and pays over the proceeds to his counsel, and then goes into insolvency, such proceeds will pass to his assignee in insolvency.

BILL IN EQUITY, filed December 5, 1887, in this court, under the Pub. Sts. c. 151, § 2, cl. 11, and the St. of 1884, c. 285, § 1, to compel the defendant to sell and transfer his membership in the Boston Stock Exchange, and to apply the proceeds to the plaintiff's claim. On December 31, 1888, a decree was entered by a single justice, which recited the defendant's indebtedness to the plaintiff in the sum of $6,050, and that the defendant had no property that could be reached or taken on execution in an action at law, and ordered him forthwith to sell and transfer such membership in due form, and out of the proceeds of such sale, after satisfying the claims of the Exchange or of members thereof, if any, to pay to the plaintiff the balance remaining, to an amount not exceeding the amount of his claim. From this decree the defendant, on January 25, 1889, appealed to the full court. On March 26, 1889, one Davenport filed a petition, reciting that on March 22, 1889, he had been duly appointed the assignee in insolvency of the defendant's estate, and praying that he might intervene in the case and prosecute the defendant's appeal for the benefit of creditors, which petition was allowed. On April 18, 1889, Davenport filed a supplemental answer, to which the plaintiff filed a replication on July 16, 1890. Subsequently, on February 18, 1891, the plaintiff and the assignee signed and filed an agreement in writing, which recited that the defendant, pending his appeal and before going into insolvency, transferred his membership in the Stock Exchange, and, after satisfying various claims due the members thereof, had left in his hands the sum of $1,547.83, which amount he thereupon paid over to his counsel, in whose hands it still was, subject to the control of the assignee in insolvency, to which sum the plaintiff claimed to be entitled; and that there had been proved against the plaintiff's estate in insolvency claims amounting to $3,052, besides which there were claims unproved amounting to $3,500, exclusive of the plaintiff's claim.

Field, C. J., at the request of both parties, reserved the case upon the original appeal, the pleadings subsequent thereto, and the agreed statement of facts filed by the parties, for the

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consideration of the full court, such decree to be entered as justice and equity may require.

R. M. Morse, Jr. & W. M. Richardson, for the plaintiff.

F. Paul, for the assignee.

KNOWLTON, J. The agreement in writing filed by the parties, and their request that the case be reserved for the full court on the original appeal, the pleadings subsequent thereto, and the agreed statement of facts, are a waiver of all questions of form in regard to the proceedings previously had, and the manner of bringing the case before us. We may, therefore, consider the entire case on its merits.

If we assume in favor of the plaintiff, without deciding, that the bill was properly brought, and that the decree of the single justice in favor of the plaintiff was well warranted by the facts existing when it was made, the subsequent insolvency of the defendant before the final disposition of the case gives his assignee rights which must be recognized in the interest of the general creditors. It has repeatedly been held that a plaintiff bringing a bill in equity under the provisions of the Pub. Sts. c. 151, § 2, cl. 11, and the St. of 1884, c. 285, § 1, to reach property of the debtor which "cannot be come at to be attached or taken on execution in a suit at law against such debtor," does not thereby acquire a lien on the property which will prevent its passing to an assignee in insolvency. *Trow* v. *Lovett*, 122 Mass. 571. *Squire* v. *Lincoln*, 137 Mass. 399. *Powers* v. *Raymond*, 137 Mass. 483. Such a proceeding, even if followed by an injunction against any disposition of the property by the debtor, does not constitute an attachment, within the meaning of the Pub. Sts. c. 157, §§ 46, 47, and does not defeat the right of the assignee to have everything that belongs to the debtor which can lawfully be taken at law or in equity and applied to the payment of his debts.

The proceeds of the defendant's transfer of his membership in the Boston Stock Exchange, which he paid over to his counsel, were a part of his assets, to which his assignee in insolvency is entitled by virtue of the assignment. *Barton* v. *White*, 144 Mass. 281. Inasmuch as the plaintiff has acquired no lien on the property, the entry must be,

Bill dismissed.

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WATUPPA RESERVOIR COMPANY *vs.* CITY OF FALL RIVER. TROY COTTON AND WOOLLEN MANUFACTORY *vs.* SAME.

Bristol. March 19, 1891. — September 2, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Ancient Grant — Great Ponds — Colony Ordinance — Possession — Injunction.

The Colony ordinance of 1647 was extended so as to become a part of the common law of Plymouth Colony, by usage and judicial decision, only from 1692, the date of the Province Charter.

By the Pocasset grant of March 5, 1680, from the Plymouth Colony to certain individuals for a substantial sum of money, the waters within the territory described in the conveyance, including great ponds so far as they lay within it, and the water rights connected therewith, passed to the grantees as private property before the colonial ordinance of 1647, devoting great ponds not then appropriated to private persons to the public use, went into effect in that Colony.

Where the whole of one great pond, and part of another great pond connected with it, were conveyed to certain individuals as private property by the Plymouth Colony prior to 1692, neither the Colony as owner of the remaining part of the second pond, apart from the exercise of sovereign powers, nor its grantee thereof, could draw off the water to the detriment of the first grantees.

It seems that the Watuppa Reservoir Company, a corporation made up of the representatives of the several mills on the Fall River, which has built and maintains a dam at the outlet of the Watuppa ponds, and controls the whole water power in the interest of such owners and for their benefit, has a sufficient possession to entitle it to an injunction to prevent a diversion of the water from such ponds.

TWO BILLS IN EQUITY, filed in the Superior Court, to prevent the taking of water from a great pond by the defendant city, as authorized by the St. of 1886, c. 353. After the former decision, reported in 147 Mass. 548, certain additional facts were incorporated in the agreed statement filed in both cases, and the cases were again heard together before *Mason*, C. J., who ordered the bills to be dismissed; and the plaintiffs appealed to this court. The facts appear in the opinion.

The cases were argued together at the bar, in March, 1891, and afterwards, in September following, were submitted on the briefs to all the judges except *Morton* and *Barker*, JJ.

E. R. Hoar & A. J. Jennings, for the plaintiffs.

J. F. Jackson & E. Higginson, for the defendant.

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HOLMES, J. These are the same cases which were reported in 147 Mass. 548. Since that decision other facts have been added to the agreed statement, and the cases have been reargued, with reference not only to the facts now first appearing, but also to the old ones, and we have been asked to reconsider our former judgment. We intend, however, to express no opinion upon the questions passed on then, because, apart from the questions upon which our opinions were divided, we are agreed that the plaintiffs now make a case calling for the interposition of this court.

The plaintiffs are successors in title to grantees of Plymouth Colony, to whom the land under and on both sides of the outlet of the pond, the Fall River, to a point below the plaintiffs' dam, was conveyed as part of a large tract. This conveyance was made on March 5, 1680, to Church, Gray, and others, for the consideration of £1,100, and is known as the Pocasset grant or purchase. The territory described in the granting clause of the deed included the whole of the South Watuppa Pond, and a large part, but less than half, of the North Watuppa Pond. The habendum is, "all the above mentioned and bounded lands, with all and singular the woods, waters, coves, creeks, ponds, brooks, benefits, profits, privileges, and hereditaments whatsoever in before arising, accruing, belonging, or thereto anyways appertaining, or to any part or parcel thereof." The plaintiffs also own other land on the Fall River as successors in title to other grantees of Plymouth Colony, to whom another large tract was conveyed in 1656, including all of the North Watuppa Pond not embraced in the Pocasset grant. This is known as the Freemen's purchase.

The new questions concern the effect of these deeds, and more especially of the Pocasset grant. Leaving the ordinance of 1647 on one side for the moment, we are of opinion that that grant purported to convey the ponds and water power embraced within its boundaries to the grantees as private owners. It is argued that, great ponds not being mentioned in the granting clause, they must be taken to be excepted, and that the habendum cannot increase the gift. But no such technical argument can be allowed to prevail against the plain meaning of one of our early deeds, if it ever would have prevailed in a case like this any-

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where. In the conveyances made early after the settlement of the country, artificial rules yield to the intention to be gathered from the four corners of the instrument, *propter inopiam consilii. Ipswich Grammar School* v. *Andrews*, 8 Met. 584, 592. *Berry* v. *Raddin*, 11 Allen, 577, 581. It is argued also, that the title of the grantees is to be dealt with on the same footing as the title of a town, and therefore as subject to the ordinance of 1647 when that became the law. If so, then if the land at the outlet of the pond was held undivided by the original proprietors until after the Province Charter (1692), it might follow that the former decision in this case was still applicable. The town of Tiverton was incorporated in 1694, with boundaries, it is said, nearly coincident with those of the Pocasset grant. Moreover, we presume that there is no doubt that, "in the early settlements in the country, proprietors, commoners, and towns were often confounded." 2 Dane Abr. 698. If we had before us a case where, after a grant of land and a great pond to proprietors, the same grantees or their successors were incorporated as a town, and thereafter the town had assumed to act as the proprietor of the land and pond, and in that state of things the ordinance of 1647 came into operation, we might hesitate to say that the pond was not within the scope of the ordinance. *West Roxbury* v. *Stoddard*, 7 Allen, 158, 171. But the elements of the case supposed, or of any equivalent to it, are wanting. The original conveyance, the Pocasset grant, is not a grant to or the incorporation of a town. It is a sale of land as private property to private individuals, for a substantial sum of money. As we have said, this sale embraced the water right now claimed. So far as appears, or as we have any reason to suspect, the whole land and water rights conveyed have been dealt with as private property from that day to this. There is no ground for saying that when the ordinance of 1647 became law in the Plymouth Colony, or at any later moment, it found the Watuppa ponds the property of the Colony or of a town, or in a like position for the purposes of the ordinance. We may add that the town of Tiverton was not in existence until two years after the date of the Province Charter, which it seems is to be taken as the date when the ordinance of 1647 was extended to Plymouth. *Litchfield* v. *Scituate*, 136 Mass. 39, 46, 47.

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There is no doubt, of course, that if the pond and the rights claimed by the plaintiffs had been appropriated to private persons before the ordinance went into effect, those rights remained unaffected afterwards. *Berry* v. *Raddin*, 11 Allen, 577. Again, we do not understand it to be disputed that, if the original Pocasset grantees got a private right to the water power now used by the plaintiffs, and did not lose it at the date of the Province Charter, the plaintiffs now have it. It seems to be plain that whatever mill or water rights the Pocasset grantees had at the mouth of the pond they conveyed to the plaintiff's predecessors in title. Finally, if the whole of the Watuppa ponds was the subject of private ownership, or if the Colony retained a part of one, subject to its conveyance of the rest to the Pocasset grantees, the other owner, whether the grantees of the Freemen's purchase or the Colony in its capacity of owner and apart from the exercise of sovereign powers, could not draw off the water to the detriment of the Pocasset grantees. See *Tudor* v. *Cambridge Water Works*, 1 Allen, 164; *Smith* v. *Moodus Water Power Co.* 33 Conn. 460.

The only question which remains is whether the ordinance of 1647 modifies the conclusion to which we have come apart from it. This may be answered in a few words. In *Litchfield* v. *Scituate*, 136 Mass. 39, 46, it is said that there is no sufficient evidence that the ordinance was the law of Plymouth Colony before its union with Massachusetts under the Province Charter, aud on the next page the time when the Province Charter passed the seals is indicated as the moment when we are to take it that the ordinance became applicable to that part of the State. It is true that, when it did become applicable, it became so as part of the common law, and that the fiction generally applied in respect to the common law is, that it is only declared by the courts, and has existed immemorially. But when the ordinance of 1647 is said to be part of the common law of Plymouth Colony, all that is meant is, that, as was said in *Litchfield* v. *Scituate*, it has been extended to that territory by usage and by judicial decision. Such an extension does not necessitate a fiction that the law has been so always, which would be as unreasonable as a change of private rights in the guise of a declaratory statute.

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It is fiction enough if we assume that the common law of Plymouth Colony conformed to the ordinance from the date of the Province Charter, a date too late to affect the plaintiffs in this case. An illustration may be suggested from our common law as to prescription. This has conformed to the statute of limitations as it has been altered from time to time. *Coolidge* v. *Learned*, 8 Pick. 504. *Melvin* v. *Whiting*, 10 Pick. 295, 297. *Edson* v. *Munsell*, 10 Allen, 557, 564. But we do not suppose that it would be argued that, when the statute was changed, the common law was changed for past time, retrospectively, so that, for instance, the use of a way for twenty years while the St. of 1736, c. 18, was in force should now be held to have gained a right, although at the time it was insufficient to do so.

There is no question made as to the remedy, if the plaintiffs' rights are established. *Tudor* v. *Cambridge Water Works*, 1 Allen, 164. We regard what we have said as sufficient to establish the rights of the Troy Cotton and Woollen Manufactory. It owns the land at the outlet of the pond. This being so, probably it is not regarded as material whether an injunction shall be issued in the case of the Watuppa Company also. That is a corporation made up of the representatives of the several mills owning water power on the Fall River, but seems not itself to be an owner of land or water rights. We gather, however, from the facts admitted, that it has built and is in possession of a dam at the outlet of the pond, and controls the whole water power in the interest of the owners, for their benefit. We are disposed to think that it shows a sufficient possession under the title of the owners to warrant the issuing of an injunction in its behalf.

Decree for the plaintiffs.

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HENRY B. STRATTON *vs.* THOMAS F. HERNON & another.

Suffolk. March 24, 25, 1891. — September 2, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Fraudulent Conveyance — Equity — Demurrer — Jury Trial — Waiver.

The Pub. Sts. c. 151, § 3, give a concurrent remedy in equity to reach and apply, in payment of a debt, property conveyed in fraud of creditors.

If a general demurrer and an answer to a bill in equity are filed on the same day, an agreement of counsel that the "action may be marked for hearing" on a day subsequent waives any right the defendant may have had to a jury, although at the date of the agreement the demurrer is undisposed of, and a replication is not filed until the day of the hearing.

A bill in equity against a husband and wife, alleging a debt to be due to the plaintiff from the husband and a conveyance by him of his property to the wife in fraud of creditors, the wife sharing in the fraud, contained an alternative count at law against the wife for the same debt. The answer, filed with a general demurrer, alleged that the contract out of which the debt arose was made with her through the husband's agency, and a decree was entered against the wife alone, and execution ordered to issue thereon. *Held*, that the decree might be sustained upon the pleadings, under the St. of 1887, c. 383, §§ 1, 3.

BILL IN EQUITY, against Thomas F. Hernon and Ellen F. Hernon, filed in the Superior Court on August 4, 1890, to have certain real estate applied in payment of the plaintiff's claim. The case was heard by *Dewey*, J., who reported it for the determination of this court, and was as follows.

The bill alleged that Thomas F. Hernon represented to the plaintiff that he had bargained for a parcel of land in Boston, which was described, and was to have a deed of the same and to build a house thereon; that he entered into a contract with the plaintiff to perform the labor and furnish materials in constructing the same, and the plaintiff had done so to the extent of $722.50, which amount was still due to the plaintiff; that after the plaintiff had begun the work, on March 28, 1890, Thomas F. caused this parcel to be conveyed, and himself conveyed other land owned by him, through a third person, to Ellen F., in fraud of his creditors; that both defendants "participated in said fraudulent intent in both of said conveyances"; and that Thomas F. had "no attachable property standing in his own name, and that all of said conveyances

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were made for the purpose of delaying, defeating, and defrauding the creditors of said Thomas F. Hernon, and of securing said property to his use and benefit." The bill then proceeded: "Seventh. That the labor and materials so done, performed, and furnished by the plaintiff upon the said house upon the employment of the said Thomas F. Hernon have gone into the estate so caused to be conveyed to the said Ellen F. Hernon, as stated in the third item in this bill of complaint, and that the same was done, performed, and furnished with the knowledge and consent of the said Ellen F. Hernon, and that she is liable therefor." The prayer of the bill was that the sum due the plaintiff "from the said defendants, each or either of them," might be ascertained and decreed to be paid to the plaintiff, and that such real estate, or so much as might be necessary, should be applied to such payment.

The defendants, on August 28, 1890, demurred to the bill for want of equity, and "because the plaintiff had a full, adequate, and complete remedy at law." The defendants on the same day filed an answer which denied that the conveyances in question were made to Ellen F. in fraud of creditors, and alleged that Thomas F. in making the contract with the plaintiff acted as the agent of Ellen F.; and that the plaintiff had failed to perform his contract. Subsequently the counsel for the parties signed an agreement that the case might be "marked for hearing for Thursday, November 13, 1890." The replication was filed on December 2, 1892; and the case came on to be heard on the same day, and the parties with their witnesses were then before the court. The defendants then asked leave to file an amendment to their answer, reciting that they desired a trial by jury of the facts involved in the case. The judge, upon the plaintiff's objecting, declined to allow the amendment and the framing of issues for a jury, and directed the trial to proceed. After finding that the conveyances were not made by Thomas F. with the fraudulent purpose alleged in the bill, and that in making the contract with the plaintiff he was acting for and in behalf of his wife, with full authority as her agent to bind her in the premises, of all of which the plaintiff was ignorant, the judge made a decree that the plaintiff "recover of the defendant Ellen F. Hernon for the work and labor performed and materials furnished . . .

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the sum of five hundred and fifteen dollars," with the costs of suit, "and that execution issue therefor in due form, and that the bill be dismissed without costs as to the defendant Thomas F. Hernon."

J. P. Leahy, for the defendants.

R. Lund, (*W. E. Jewell* with him,) for the plaintiff.

HOLMES, J. 1. The plaintiff's bill alleged a contract for work and materials with the defendant Thomas, and a conveyance of his property by him to his wife in fraud of creditors, the wife sharing in the fraud. It sought to have the property applied in payment of the debt due the plaintiff. To this there was a general demurrer for want of equity, and on the ground that the plaintiff had an adequate remedy at law by attachment. Pub. Sts. c. 172, §§ 1, 49; c. 161, § 66. The demurrer was properly overruled. A concurrent remedy in equity is given expressly by the Pub. Sts. c. 151, § 3. *Bernard* v. *Barney Myroleum Co.* 147 Mass. 356, 359. The proviso in § 2, "when the parties have not a plain, adequate, and complete remedy at the common law," does not apply to § 3, and was done away with to a great extent where it did apply by what is now § 4. It is unnecessary to invoke the later statutes. St. 1887, c. 383, §§ 1, 3. St. 1883, c. 223, § 17. No question of form is open.

2. The bill was filed on August 4, 1890. The demurrer was filed on August 28, and an answer was filed the same day. Afterwards a written agreement was made between counsel that the "action may be marked for hearing for Thursday, November 13, 1890," and the cause was set down for hearing, and was heard on December 2d in pursuance of it. The replication was not filed until December 2d. When the case came on to be heard, and the parties were present with their witnesses, the defendants demanded a jury trial. The judge denied the defendants' right to a jury as the case stood, and in the exercise of his discretion declined to allow issues to be framed, and directed the trial to proceed. We are of opinion that the course of the judge, so far as it is open to revision, was correct. It is true that, when the agreement was made, the demurrer had not been disposed of, and a replication had not been filed. But the filing of the replication is a formal matter, which so habitually is put off until the hearing that its absence cannot be allowed to affect the

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construction of the agreement. We assume, in favor of the defendants, that the answer did not overrule the demurrer, (*Fogg* v. *Price*, 145 Mass. 513, 514,) but still the agreement cannot be confined to a hearing on the demurrer. It is every-day practice to hear the questions of law raised by the demurrer, and the questions of fact raised by the answer, at the same time, and the agreement must be taken to have contemplated this. It is shown to have done so by the fact that both parties had their witnesses present. Therefore, the defendants had manifested their election to waive any right they might have to a jury. *Dole* v. *Wooldredge*, 142 Mass. 161, 179.

3. The only other question is whether the pleadings sustain the decree. The judge who tried the case reports that he did not find the alleged fraud to have been proved, but he did find that the defendant Thomas contracted with the plaintiff, on behalf of his wife, the defendant Ellen, as undisclosed principal, and that she owed the plaintiff five hundred and fifteen dollars, and made a decree for that amount. The bill is ill drawn, but beside the elements mentioned as sufficient to sustain it against a general demurrer, it alleges in the seventh paragraph that the defendant Ellen is liable for the labor and materials, and prays that the sum due the plaintiff may be decreed to be paid him by that one of the defendants who shall be found to owe the same. In other words, alongside of the case in equity against the husband there is inserted an alternative count at law against the wife. Nothing could be worse in point of form, but no point of form is open. Furthermore, the answer alleges that the contract was made with the defendant Ellen through the agency of her husband. If it were necessary, in order to sustain the so called decree after a fair trial on the merits, we should leave it open to apply to the Superior Court for leave to amend into an action at law. If the decree on a purely common law claim had purported to impose a personal order on the defendant, with liability to process for contempt in case of failure to obey, there might be a question whether it could be sustained. But the decree is, in truth, only a judgment at law, with an order for execution. This being so, in view of the St. of 1887, c. 383, §§ 1, 3, we are of opinion that the decree may be sustained on the pleadings as they stand. *Decree affirmed.*

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BOSTON AND PROVIDENCE RAILROAD CORPORATION & another *vs.* WILLIAM DOHERTY.

Suffolk. March 27, 1891. — September 2, 1891.

Present: ALLEN, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Railroad — Private Crossing — Right of Way — Extinguishment of Easement License.

Since the St. of 1874, c. 372, § 81, (Pub. Sts. c. 112, § 113,) a structure, by which a landowner whose lands have been appropriated by a railroad company may conveniently cross the tracks at the same grade, or over or under the same, may be ordered, if the county commissioners judge it reasonable for his security and benefit.

An easement may be extinguished, revoked, or modified by a parol license granted by the owner of the dominant tenement, and executed by the owner of the servient tenement.

If a parol license is to do that upon the licensee's own land which prevents the further enjoyment by the licensor of an easement in the land, such a license when executed is irrevocable, and the effect of it is to extinguish the easement.

On the issue whether a right of way across the plaintiff's railroad tracks enjoyed by the defendant had been extinguished by his license to the plaintiff to close up the way conditioned upon another suitable way being furnished to the defendant, which condition the plaintiff had performed, the plaintiff, against the defendant's objection, offered evidence that, on account of the great increase of the plaintiff's business the condition of affairs had become such that it was not safe for the operation of the road to continue such way; and that additional accommodations, which, if built on the plaintiff's land, would necessarily extend across and close up the way, were absolutely necessary for the accommodation of the travelling public. *Held*, that the evidence was properly admitted.

BILL IN EQUITY, filed in the Superior Court, to declare void an order of the county commissioners directing the first named plaintiff to maintain a private crossing over its railroad, and to prevent the defendant from using the same as a means of access to his land. Hearing before *Dewey*, J., who reported the case for the determination of this court, in substance as follows.

In 1849, the Boston and Providence Railroad Corporation, located its railroad over a parcel of land in Roxbury belonging to Mary White, and in the same year the county commissioners, in assessing her damages, ordered the corporation to "make and forever maintain a cart and carriageway across their railroad" for the use of said White, "her heirs and assigns, in

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the access to and use of her remaining lands adjoining the part taken by the railroad." The corporation carried out this order of the county commissioners by making and maintaining the way, and White and those claiming under her used the same. On April 7, 1888, the Boston and Providence Railroad Corporation leased and delivered possession of its property to the Old Colony Railroad Company, which was the other plaintiff, but before possession was taken under this lease, the defendant, one Meserve, and two others had each secured title to a portion of the land of White, and had exercised the right to cross the tracks by the way in question. The plaintiffs were permitted to introduce evidence, subject to the defendant's exception, that, at the time possession was taken under this lease, the travel and business upon the railroad had largely increased, so that it was not safe for the operation of the road to use the way across the track; and that additional accommodations, which, if built on the plaintiffs' land, would necessarily extend across and close up the way, were absolutely necessary for the accommodation of the travelling public. The lessor corporation just before the transfer of its property was arranging to construct such additional accommodations, and on April 2, 1888, its engineer, who was in charge of the matter, and who continued in charge of it for the lessee company, had an interview with Meserve, and told him that the lessor corporation would like to do away with the crossing, and offered in its behalf to buy a strip of land leading from the defendant's premises to a public way which was not laid out when the railroad was located, and to put it in order for travel as a substituted way, and to convey it to the defendant and those interested in the way in question in exchange therefor. Meserve at the engineer's request immediately communicated to the defendant the terms of the offer, and the defendant and the others interested assented to the proposal. The strip of land was then put in order for travel, and a conveyance of the new way executed to the defendant and those interested in the old way, which was delivered and recorded by Meserve, but not afterwards accepted by the defendant. The new way was opened for the use of the parties on April 17, 1888, and was used by them, including the defendant. Meanwhile, and before April 17, the lessee company, without objection from the defendant,

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had been making the necessary changes and improvements in its premises, and in so doing had destroyed a bridge which was a part of said crossing, built a fence on the line of the location across the old way, and otherwise interrupted, obstructed, and closed the crossing, leaving no access to the premises of the defendant from any public street, except across the land of others, until the new way was opened. Some time between April 20 and 25 of the same month, the defendant told Meserve that he did not like the new way, and refused to release his rights in the crossing. On July 12, 1888, the defendant brought an action of tort against the lessee company, to recover damages caused for obstructing and closing the way in question, which action is still pending.

The case was argued at the bar in March, 1891, and afterwards, in September, 1891, was submitted on the briefs to all the judges except *Field*, C. J. and *Holmes*, J.

J. H. Benton, Jr., for the plaintiffs.

C. W. Turner, for the defendant.

KNOWLTON, J. Under the order of the county commissioners the defendant had a right of way across the plaintiff's tracks. Since the enactment of the St. of 1841, c. 125, § 1, which is now § 113 of the Pub. Sts. c. 112, the county commissioners have had authority, at the time of estimating damages to landowners for the appropriation of their lands by a railroad company, to order the corporation to construct and maintain such embankments, culverts, walls, fences, or other structures as they judge reasonable for the security and benefit of such owners. Without a right to cross the railroad, a landowner might be entirely cut off from access to a valuable portion of his estate, and there can be no doubt that, under this section, a structure on which the owner may conveniently cross under the track or over it, or on the same grade with it, may be ordered, if the commissioners judge it reasonable for his security and benefit. This has been the practical construction of the statute all over the Commonwealth for nearly forty years, and it has been assumed by the court to be correct. *White* v. *Boston & Providence Railroad*, 6 Cush. 420. *Keith* v. *Cheshire Railroad*, 1 Gray, 614. *Presbrey* v. *Old Colony & Newport Railway*, 103 Mass. 1. *Gay* v. *Boston & Albany Railroad*, 141 Mass. 407, 408.

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The important question in the case is whether the defendant's easement was extinguished by his license to the plaintiff to close up the way, and by the execution of this license. By the evidence which was introduced, subject to the defendant's exception, it appeared, among other things, that on account of the great increase of the plaintiff's business the condition of affairs had become such "that it was not safe for the operation of the road to continue the way claimed by the defendant and others across the track." We think this evidence was competent, as showing the relation of the easement to the property of each of the parties, and to the uses that could be made of it, and as bearing upon the construction which the court should put upon the defendant's acts in reference to the easement. It is a well established rule of law that an easement may be extinguished, renounced, or modified by a parol license granted by the owner of the dominant tenement, and executed by the owner of the servient tenement. *Dyer* v. *Sanford*, 9 Met. 395. *Morse* v. *Copeland*, 2 Gray, 302. *Curtis* v. *Noonan*, 10 Allen, 406. *Canny* v. *Andrews*, 123 Mass. 155. *King* v. *Murphy*, 140 Mass. 254. One cannot acquire an interest in the land of another by executing a parol license from the owner to occupy or use it, for such a license is revocable. But if the license is to do that upon the licensee's own land which prevents the further enjoyment by the licensor of an easement in the land, such a license, when executed, is irrevocable, and the effect of it is to extinguish the easement.

An easement may be lost by abandonment; and whether there is an abandonment is ordinarily a question of intention. If the extinguishment of an easement by the execution by the owner of the servient estate of a license which prevents the further enjoyment of the easement rests on the ground that the owner of the easement intentionally abandons it, — and where there is a complete extinguishment it may well rest upon that ground, — his intention is conclusively presumed in favor of the owner of the servient tenement who executed the license, because between these parties, when one acts upon the license of the other, the manifest and apparent intention which is acted upon must control their rights, whatever the secret intention of the licensor may be.

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In the present case, the defendant licensed the plaintiff to obstruct and cut off his way on condition that it would provide him another designated way as a substitute therefor. He must have expected that the execution of the license and the performance of the condition would deprive him of his old way and leave him with a new one. His knowledge of the facts put in evidence, against his objection, shows that he must have understood that he could not longer use the old way after his license was executed. His license was conditional, and his rights were protected by the condition. The plaintiff performed the condition, and in execution of the license made the necessary changes and improvements on its premises, "destroyed a bridge, part of said crossing, built a fence on the line of the location across the old way, and otherwise interrupted, obstructed, and closed the crossing" several days before the defendant made any objection, or expressed any dissatisfaction with the arrangement which he had made.

We are of opinion that the performance of the condition, and the execution of the license, worked an extinguishment of the defendant's easement. As against the plaintiff, he must be conclusively presumed to have intended to abandon his easement on the performance of the condition when he gave the license; and the license having been acted upon, and being irrevocable, the abandonment became complete. *Injunction to be granted.*

RICHARD OLNEY & others *vs.* FRANCIS V. BALCH & others.

Suffolk. April 1, 1891. — September 2, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Will — Power of Appointment — Assets.

A testatrix out of the income of a trust fund gave an annuity to her son G., to whose children one seventh of the fund was to go at his death, and directed the rest of such income to be divided among her six daughters during their lives, the share of the income of each at her death to be paid to her issue "until the time at which the principal estate is to be held and distributed as hereinafter is provided for, and to the use of my grandchildren"; if no issue, to her

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surviving sisters and their issue. The will then provided that "each and every of my daughters are authorized to dispose of their several proportions of the principal of the trust estate by will or other testamentary instrument, which power shall be exercised to take effect only in the event that the daughter exercising the power herein conferred shall decease without issue her surviving"; and in a later clause, that "at the decease of the survivor of my seven children, the estate in the hands of the trustees, subject to the provisions hereinbefore made for my son and his child or children him surviving, shall be divided into shares equal in number to the number of my grandchildren then living, excluding from such number the child or children of my son G. unless they shall be the sole surviving grandchildren, and one share shall thereafter be held in trust for each grandchild." G. died before his sisters, one of whom, S. P., afterwards died leaving no issue, having disposed by will of her share in her mother's estate. *Held*, that S. P. had a right to make a disposition of her share of the principal of the trust fund to take effect upon her death; and that such share became in equity a part of the assets of her estate, and was to be paid over to her executors to be administered by them.

BILL IN EQUITY, by the trustees under the will of Sally Hammond, for instructions as to the distribution of a part of a trust estate. The case was heard, and reserved for the consideration of the full court, and was as follows.

The five living daughters of Sally Hammond, the executors and trustees and appointees under the will of a deceased daughter, Sally S. Pickering, and all of the living grandchildren of Sally Hammond, were made parties defendant. A guardian *ad litem* was appointed to represent persons unascertained and not in being. By her will the testatrix gave the greater part of her estate in trust to the plaintiffs, to "hold the estate given to them for and during the natural lives of my seven children and the survivor of them, and until the distribution of the principal sum, as is in this instrument hereinafter provided." The will then provided, in the fourth article, that out of the income of the trust estate the trustees should pay to her son George Hammond during his life the sum of one thousand dollars annually, and at his death one seventh part of the estate held by the plaintiffs in trust was to be paid over to his child or children. By the fifth article of the will, the trustees were directed "to pay the residue of the income which may be derived from the trust estate" to the six daughters of Sally Hammond during their lives. The will then continued as follows:

"Sixth. If any of my daughters shall decease leaving children her surviving, the income theretofore payable to such

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daughter shall thereafter be paid to such children until the time at which the principal estate is to be held and distributed as hereinafter is provided for, and to the use of my grandchildren.

"Seventh. If any of my daughters shall decease without leaving any child or children her surviving, the income theretofore payable to such daughter shall thereafter such decease be distributed to her surviving sisters, and the issue of any deceased sister, such issue taking by representation. Each and every of my daughters are authorized to dispose of their several proportions of the principal of the trust estate by will or other testamentary instrument, which power shall be exercised to take effect only in the event that the daughter exercising the power herein conferred shall decease without issue her surviving.

"Eighth. At the decease of the survivor of my seven children, the estate in the hands of the trustees, subject to the provisions hereinbefore made for my son and his child or children him surviving, shall be divided into shares equal in number to the number of my grandchildren then living, excluding from such number the child or children of my son George, unless they shall be the sole surviving grandchildren, and one share shall thereafter be held in trust for each grandchild, the income to be paid to him or her during his or her life, and at his or her decease the principal sum of such share to be paid to such person as he or she may by will direct, in default of such direction to his or her heirs. The exclusion of the child or children of my son George, as in this clause is provided, results from the provision made for him and his children in the fourth clause."

After the death of the testatrix, George Hammond died, and the share of the trust estate theretofore held for his benefit was paid over as required by said will. Sally S. Pickering, one of the daughters of the testatrix, has died without leaving any surviving child or children, and leaving a will whereby she exercised the power of appointment created by the seventh article of the will of Sally Hammond.

The surviving sisters of Sally S. Pickering contended that the will of Sally Hammond did not confer upon Sally S. Pickering any power of testamentary disposition over any part of the

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trust estate, and that the share of income formerly payable to her should be paid to such sisters until the principal of the trust estate becomes distributable by the death of the last survivor of them.

The executors of the will of Sally S. Pickering and the appointees under her will both contended that she had full power of testamentary disposition over one sixth of the fund remaining in the hands of the plaintiffs after the payment to the children of George Hammond, and that she had duly exercised the power; and as between themselves each class respectively contended that it was entitled to demand and receive at once one sixth of said remaining trust estate. The question was also raised whether any appointment made by a deceased daughter would take effect until the final distribution of the estate provided for upon the death of the survivor of the seven children of the testatrix.

R. H. Gardiner, for the executors of Sally S. Pickering.

F. Rackemann, for a trustee under the will of Sally S. Pickering.

F. I. Amory, for the surviving daughters of Sally Hammond.

S. Butler, for grandchildren of Sally Hammond.

F. C. Lowell, for the guardian *ad litem*.

ALLEN, J. Upon an examination of the various provisions of this will, which are thought to be somewhat inconsistent with each other, we are brought to the conclusion that, by the second clause of the seventh paragraph, the testatrix gave to each daughter authority to dispose by will of her proportion of the principal of the trust estate, to take effect only in the event that such daughter should die without issue. This authority might be qualified by the right of George to receive one thousand dollars annually, from the income of the whole property left in trust, during his life; but as he died before either of his sisters, this need not be considered. Subject to this possible right, we think Sally S. Pickering had the right to make a disposition of her share of the principal, to take effect upon her death, and that the various provisions which are thought to give rights inconsistent with the exercise of this authority must be construed in subordination thereto.

She having executed a will making a disposition of her share in her mother's estate, the property thus disposed of is deemed

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in equity to be a part of her assets, and subject to the demand of her creditors in preference to the claims of her voluntary appointees or legatees. *Clapp* v. *Ingraham*, 126 Mass. 200.

The question is raised whether the property should be administered by the trustees under the mother's will, they paying over the property to the persons who are to receive it under the will of the daughter, or whether those trustees should pay it over to the daughter's executors, to be administered by them. The latter seems to us to be the proper course. Creditors, if there are any, will present their claims to the executors, and will be barred within two years. The duty of the trustees is well discharged by paying over the requisite sum to the executors of the daughter's will. If it, or any part of it, is needed for debts, the executors are the proper persons to ascertain and pay them. They can hold the property, exempt from suits, for a proper length of time, for this purpose. As a method of administration, it is more simple and convenient to treat the property as assets of the daughter's estate, to be administered by her executors. *Hayes* v. *Oatley*, L. R. 14 Eq. 1. *In re Hoskin's trust*, 5 Ch. D. 229, and 6 Ch. D. 281. We need not anticipate the question suggested by counsel, whether this property can be applied to debts before all other assets are exhausted.

In *O'Donnell* v. *Barbey*, 129 Mass. 453, where a trustee was directed to pay directly to a creditor of one who had exercised a power of appointment, the circumstances were peculiar. One Brooks had died, leaving no property of his own, but leaving a will in which he exercised a power of appointment. Barbey was his executor and appointee; and, as executor, had refused to pay the claim of the plaintiff, who was a judgment creditor of Brooks. The appointed property was held in trust, and the plaintiff filed his bill against Barbey and the trustee, to establish his right to be paid from the appointed property. This right was established; and it was said that the trustee should sell the property and pay the plaintiff. An examination of the briefs shows that the point was not taken that the money, if going to the plaintiff, should pass through the executor's hands. The method there adopted, though highly proper under the circumstances which there existed, is no rule for the present case.

Decree accordingly.

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ATTORNEY GENERAL *vs.* GEORGE C. ABBOTT.

Bristol. October 28, 29, 1890. — September 3, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP & BARKER, JJ.

Park — Dedication to the Public — Acceptance.

In 1866 six landowners united in a plan to establish a seaside resort, and became the sole stockholders and directors of a land company, to which the land was conveyed, four directors forming a quorum and having the powers of the entire board. The land was laid out, and plans were prepared showing among the lots open spaces, one, afterwards called Ocean Park, being delineated on a plan recorded in August, 1867. Other land was bought, and a new plan recorded in 1870, showing three parks, including Ocean Park, which alone was somewhat changed in boundary as appeared on a plan dated June, 1871. A few lots were sold in 1867 and 1868, and later sales were rapid and numerous. Printed copies of the plans, that of 1867 with Ocean Park added, were widely circulated as advertisements of the sale of lots, and were kept in the directors' room for free distribution. At the outset those interested discussed the leaving of such spaces open, the lots fronting thereon being deemed preferable, and at sales assurances were freely given that they would always be kept open. Four of the directors declared that it was the intention to make these spaces public parks; another admitted that he had seen and himself given away the plans; and the remaining one, who thought too much land was devoted to parks, afterwards acquiesced in the opinion of the majority. These spaces were used by the public as parks before the year 1880. *Held*, upon an information filed in August, 1887, to prevent interference with the public use of the parks by one to whom the company attempted to convey them in 1885, that there was an intention on the part of the owners to dedicate them to the use of the public as parks, and that the same had been used by the public enough to show an acceptance thereof.

The acceptance of a dedication of land to the public at common law need not be very specific or appear of record, and need not be by the town in which the land lies.

Upon the dedication of a park to the public at common law, the fee remains in the original owners.

The grantee of land of which a previous dedication has been made to the public is bound by such dedication, whether it appears of record or not, and cannot claim to be a *bona fide* purchaser for value, especially if he is put upon inquiry, and makes a laborious investigation of the facts, and pays much less than the value of a clear title to the land.

INFORMATION, filed August 17, 1887, by the Attorney General, to prevent the defendant from interfering with Ocean Park, Hartford Park, and Waban Park, so called, in Cottage City, to which he claimed title under a deed from the Oak Bluffs Land

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Company, dated April 28, 1885. The case was heard in 1889, by *Field*, J., upon the pleadings and evidence reported by the commissioner and special master, and was reserved by him for the consideration of the full court, such decree to be entered as justice might require. The facts appear in the opinion.

The case was argued at the bar in October, 1890, and afterwards, in June, 1891, was submitted on the briefs to all the judges.

J. D. Ball & G. C. Abbott, for the defendant.

T. M. Stetson & H. M. Knowlton, for the Attorney General.

ALLEN, J. A perusal of the voluminous evidence, aided by the full briefs of counsel, shows to our satisfaction that there was an intention on the part of the owners of the parcels of land called Ocean Park, Hartford Park, and Waban Park to dedicate them to the use of the public as parks, and that the same were used by the public enough to show an acceptance thereof prior to the year 1880.

It will not be useful to state in much detail the evidence which leads to these results, or to discuss the particulars in which witnesses disagree or contradict each other. The general features, however, are as follows. In 1866, six persons united in a plan for making a place of summer resort at Oak Bluffs in Edgartown. One of them already owned a large lot of vacant land which was deemed suitable for the purpose. Each of the five others purchased an undivided sixth part thereof. A professional landscape gardener, Mr. Copeland, was employed to lay out the grounds in such a manner as would be likely to attract people who should come there only for the summer, and to induce them to buy lots, build cottages, and establish a village. In 1867 a deed of the premises was made to two of their number, as trustees for the benefit of the six owners; and in 1868 an act of incorporation was obtained, and the land was conveyed to the corporation. The sole purpose of the corporation was the holding, improving, and disposing of the land and a wharf then held by the two trustees, with power also to purchase, hold, improve, and dispose of other adjacent lands. St. 1868, c. 60. At the outset the original six owners constituted all of the stockholders of the corporation, and they all became directors. According to the by-laws, four directors constituted a quorum, with full power

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to do all that the full board of directors could do; and the directors were to prepare the real estate of the company for sale, make sales thereof, expend all moneys, and dispose of all other property of the company in such manner as they should judge best calculated to promote the object of the company and advance the interests of the stockholders, and make such improvements as they might deem advisable. Plans for laying out the proposed village were prepared by Mr. Copeland, showing open spaces not divided into lots. These plans underwent certain changes in matters of detail. One plan, recorded August 20, 1867, showed such an open space, to which, on later plans, the name of Ocean Park was given, though with a change of limits. After this, and after the corporation was formed, other land was bought, and a new plan was made, which was recorded May 7, 1870, showing the three parks now in controversy, described by their names. After this there was no change in the boundaries of Hartford Park and Waban Park, but there was a change in Ocean Park. A new plan was made, dated June 1, 1871, showing Ocean Park with somewhat modified boundaries, and the other parks as in the earlier plan, and this was recorded July 5, 1871. Still another plan was made in 1871, showing the three parks without change of limits, and this was recorded in 1873. A few lots were bargained for in 1867, but no sales were actually completed till 1868, after which lots were rapidly sold, to the number of five hundred within three years. Copies of the several plans were struck off and widely circulated. The printed copies of the plan which was recorded August 20, 1867, had the name of Ocean Park added. Some of these were framed and hung up in hotels, steamboats, railroad stations, and other public places. Very many were distributed through the mails. During all the period of settling the plans great pains were taken to give wide publicity to them, not only in the above methods, but by circulars and advertisements calling attention to them, and by printing a reduced copy of one or more of them upon letter sheets. Copies of the plans were also kept in the directors' room, for free distribution.

The testimony makes it very plain that the establishment of open spaces or parks was deemed an important feature of the scheme for selling lots. At the outset it was a matter of discus-

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sion among the parties interested. Lots fronting upon the parks, or having an unobstructed view of them, were deemed more attractive. Assurances were freely given by those having charge of the sale of the lots that these spaces or parks should always be kept open. Four of the original owners testify in distinct terms that it was the intention of those interested in the enterprise to make them open parks, free to the public forever. This is so extremely natural and probable, and any other course would be so unlikely, that evidence of a contrary intention on the part of any one of them would be received with some distrust. If the corporation had announced, at the time of making the sales, that it reserved the right to cut up the open spaces into building lots, and to sell them after the village should be established, it would no doubt have diminished the sales. If the corporation had an intention to reserve this right, the course pursued of inviting purchasers was inconsistent with common honesty.

The defendant concedes that some of the original owners and stockholders in the corporation gave such assurances to purchasers, and in various ways gave wide publicity to the plan of having these places kept open as public parks; but he contends that two of them did not assent to this course. One of these, Mr. Darrow, died in 1871; the other was a witness in the case. As to both of these the evidence is satisfactory to show that they assented to the plan in manner and form as it was put forth to the public. Mr. Darrow at the outset thought too much land was devoted to the parks, but after discussion acquiesced in the opinion of the majority. The other one, while in his direct testimony he denied that he ever assented to the plan, or that there was ever any authority to bind the owners of the land or the corporation by a dedication of the parks to the public, yet admitted that he knew of the existence of the plans, and of their being on record, that he had seen them at many places, and that he gave away some of them himself; probably some of each. The defendant also suggests that one Worth was interested, and never assented to the dedication. Worth held a bond from Bradley, one of the original owners and stockholders, for one half of Bradley's share of the proceeds of sales, but his title was not such as to

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give him a voice in the proceedings, or to make his assent or dissent material. He did not become a stockholder in the corporation till 1877.

Without dwelling upon various other particulars of the evidence which tend in the same direction, we cannot doubt that it was a part of the scheme of the enterprise or speculation that the public should understand that these spaces should be left open for public use, and that no right was reserved to sell them for building lots; that the corporation held out to the public this assurance, and at the time fully and fairly intended to give up this right; and that the two persons upon whose supposed dissent the defendant relies did not in fact dissent at the time. If they had done so, their dissent would be overborne by the action of the other four; but it seems to us more reasonable and probable to suppose that at the time they acquiesced, if they did not fully concur, in the views of the majority.

It is not necessary to go nicely into the question at what time the intention to devote these open spaces to the public became fully formed. There certainly was an intention that some spaces should be left open at an early day. Before the corporation was created, a plan showing such spaces was prepared and put on record. Some changes were afterwards made in the boundaries. The land containing Waban Park was subsequently purchased. The limits of these three several open spaces were finally settled after the corporation was formed. For a time there was a somewhat fluctuating intention, so far as limits and boundaries were concerned. But the limits as shown on the last two plans may be taken as representing the final conclusion of the corporation as to the limits of the spaces that were to be left open.

The fact that not much was done to adorn these spaces, and that the corporation itself did whatever was done in this respect, and to some extent assumed to exercise a certain control over the land, is not of much weight in opposition to the conclusion to which we have come. The chief element of a public park in such a place, at least till the village is well settled, is to have the land kept open. The adornment would naturally come later, if at all. The corporation did a little towards improving and caring for these open spaces. It had some interest in doing so. Ordinarily, when parks are established for public use, the munici-

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pal authorities exercise control over them. Washburn on Easements, 146, 147, 156. It was not so here. Whatever was done was done by the corporation, which to some extent did what municipal authorities usually do. The corporation was interested in pushing its speculation, and as long as it had many lots left for sale it did something for the parks; but afterwards they were much neglected.

On the whole, we think the evidence is sufficient to show an offer to the public of the spaces shown on the last two plans as Ocean Park, Hartford Park, and Waban Park. In *Attorney General* v. *Whitney*, 137 Mass. 450, where a majority of the court thought there was not sufficient evidence of such an intention, the evidence of dedication was far less strong.

The acceptance of such a dedication at common law need not appear of record, and need not be by the town. The acceptance is by the public at large, and the principal thing to show it is use by the public. Washburn on Easements, 128, 139, 140. There is no need of a formal grantee. The fee remains in the original owner. *Cincinnati* v. *White*, 6 Pet. 431. No assent of the town is necessary, because no burden is put upon the town, as in the case of a way. The improvements upon a park thus dedicated are left to be made by those who are interested. The town may take it up, or it may be left to individuals. If in a seaside summer resort no improvements at all are made, there will still be some benefit from having a space left for air, and for an open, unobstructed prospect. Whether the easement of a public park could be accepted merely by enjoying an unobstructed view over it of the ocean, need not be considered. Various other acts of use of all the parks are shown, sufficient to show an acceptance of them by the public. Such acceptance need not be very specific.

The defendant contends that such acceptance must have been by the town of Edgartown originally, or by the town of Cottage City afterwards. The chief argument in support of this view is, that there must be somebody who can be held responsible for the abatement of a nuisance, if one should exist upon the property; and that if the dedication is not to the town, and accepted by the town, there is virtually no owner of the property. This argument is of force, but the technical answer is that the fee remains

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in the original owner. The dedication for a park carries only an easement. This easement is not in the town, but it is in the public at large. There may be inconveniences in this doctrine, in cases which are supposable and possible, but the doctrine itself has been widely adopted, and has been expressly recognized as in force in this Commonwealth. *Abbott* v. *Cottage City*, 143 Mass. 521. We need not consider whether this mode of accepting a park has been done away with by the St. of 1882, c. 154.

The defendant further contends that he was a *bona fide* purchaser for value, without notice, and that his title should therefore be protected. This argument, however, cannot prevail, for two reasons. In the first place, purchasers of real estate must take notice of such a fact as a dedication to the public, in like manner as they must take notice of a title gained by adverse possession. There are various infirmities to which titles apparently good on the records are exposed. *Gillespie* v. *Rogers*, 146 Mass. 610, and cases there cited. If a dedication has become complete, the original owner cannot afterwards resume control, or convey the land free from the easement of the public, any more than if the easement had been gained by prescription. Washburn on Easements, 139. Goddard on Easements, 181. 2 Greenl. Ev. § 662. *Trustees of Methodist Episcopal Church* v. *Hoboken*, 4 Vroom, 13.

Moreover, in the present case, the defendant was fully put upon inquiry as to the facts, and made a laborious investigation of them, but came to a conclusion, either upon the law or upon the facts, different from that which we have reached. Under such circumstances it cannot be held that he was a purchaser without notice. The price which he paid was far less than the value of the land, provided the title was clear, and whatever may have been the defendant's opinion as to the validity of his title, he certainly had reason to know that it was liable to be questioned.

Decree for the plaintiff.

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PATRICK DEMPSEY *vs.* JAMES CHAMBERS.

Essex. November 8, 1890. — September 3, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Master and Servant — Ratification — Liability for Servant's Torts.

If one not in the employ of a coal dealer undertakes to deliver coal to a customer as the servant of the dealer and for his benefit, and in so doing negligently damages the customer's building, the dealer, by subsequently ratifying such delivery by him, establishes the relation of master and servant between them from the beginning, and is liable for the negligent act as if he had employed such servant beforehand.

TORT. Trial in the Superior Court, before *Thompson*, J., who allowed the following bill of exceptions:

"This was an action to recover for an injury to the plaintiff's building, the injury consisting in the breaking of a light of plate glass in the front of said building. The plaintiff claimed that the glass was broken by the carelessness of the defendant's servant. It appeared at the trial, that the glass was broken by one McCullock, while he was engaged in delivering a load of coal to the plaintiff, which had been ordered by the plaintiff of the defendant, who was a dealer in coal. The defendant claimed, and offered evidence tending to show, that at the time of the delivery of the coal McCullock was not his servant or in his employ, and undertook to deliver the coal without his direction or knowledge. It appeared that McCullock was a member of the defendant's household, accustomed to be in and about the defendant's coal-yard, and that he took the coal from the defendant's yard and on one of the defendant's wagons. It also appeared at the trial, that, subsequent to the delivery of the coal and with a full knowledge of the accident and of the delivery of the coal by McCullock, the defendant presented a bill for the coal to the plaintiff, and claimed that the plaintiff owed him for the same. The court found as a fact that the glass was broken by the carelessness of McCullock in delivering the coal, and that at the time of the delivery of the coal McCullock was not in fact the agent or servant of the defendant, or in his employ, but found

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that the delivery of the coal by McCullock was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal. And the court ruled that the defendant, by his ratification of the delivery of the coal by McCullock, became responsible for his negligence in the delivery of the coal. To this ruling the defendant excepted, and now excepts, and prays that his exceptions may be allowed.

"The case was tried by the court without a jury, and the finding of the court was for the plaintiff."

The case was submitted on briefs in November, 1890, and afterwards, in September, 1891, was submitted on the same briefs to all the judges except *Field*, C. J.

W. S. Knox, for the defendant.

J. P. Sweeney & H. R. Dow, for the plaintiff.

HOLMES, J. This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCullock, while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCullock was not the defendant's servant when he broke the window, but that the "delivery of the coal by McCullock was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant, by his ratification of the delivery of the coal by McCullock became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of opinion that the bill of exceptions does not purport to set forth all the evidence on which the finding was made. Therefore, the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day, we might hesitate to say that a man could make himself a party to a bare tort, in any case, merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the grounds of policy on which it

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must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are "fained to be all one person" by a fiction which is an echo of the *patria potestas* and of the English frankpledge. *Byington* v. *Simpson*, 134 Mass. 169, 170. Fitz. Abr. Corone, pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. *New England Dredging Co.* v. *Rockport Granite Co.* 149 Mass. 381, 382. *Fuller & Trimwell's case*, 2 Leon. 215, 216. Sext. Dec. 5. 12, De Reg. Jur., Reg. 9. D. 43. 26. 13. D. 43. 16. 1, § 14, gloss. See also cases next cited.

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another. Y. B. 30 Ed. I. 128 (Rolls ed.). 38 Lib. Ass. 223, pl. 9; *S. C.* 38 Ed. III. 18, Engettement de Garde. See Plowd. 8 *ad fin.*, 27, 31; Bract. fol. 158 b, 159 a, 171 b; 12 Ed. IV. 9, pl. 23. But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might justify it also. Y. B. 7 Hen. IV. 34, pl. 1. This decision is qualified in Fitz. Abr. Bayllye, pl. 4, and doubted in Bro. Abr. Trespass, pl. 86; but it has been followed or approved so continuously, and in so many later cases, that it would be hard to deny that the common law was as there stated by Chief Justice Gascoigne. Godbolt, 109, 110, pl. 129; *S. C.* 2 Leon. 196, pl. 246. *Hull* v. *Pickersgill*, 1 Brod. & Bing. 282. *Muskett* v. *Drummond*, 10 B. & C. 153, 157. *Buron* v. *Denman*, 2 Exch. 167, 188. *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, 13 Moore, P. C. 22, 86. *Cheetham* v. *Mayor of Manchester*, L. R. 10 C. P. 249. *Wiggins* v. *United States*, 3 Ct. of Cl. 412.

If we assume that an alleged principal by adopting an act which was unlawful when done can make it lawful, it follows

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that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitio mandato comparatur* of the Roman lawyers and the earlier cases (D. 46. 3. 12, § 4; D. 43. 16. 1, § 14; Y. B. 30 Ed. I. 128) has been changed to the dogma *æquiparatur* ever since the days of Lord Coke. 4 Inst. 317. See Bro. Abr. Trespass, pl. 113; Co. Lit. 207 a; Wingate's Maxims, 124; Com. Dig. Trespass, C, 1; *Eastern Counties Railway* v. *Broom*, 6 Exch. 314, 326, 327; and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine applied to the case of a bare personal tort. *Adams* v. *Freeman*, 9 Johns. 117, 118. Anderson and Warberton, JJ., in *Bishop* v. *Montague*, Cro. Eliz. 824. If a man assaulted another in the street out of his own head, it would seem rather strong to say that, if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. Sext. Dec. 5. 11. 23. Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit. *Wilson* v. *Barker*, 1 Nev. & Man. 409; *S. C.* 4 B. & Ad. 614, *et seq.* *Smith* v. *Lozo*, 42 Mich. 6. As in other cases it has been on the ground that they did not amount to such a ratification as was necessary. *Tucker* v. *Jerris*, 75 Maine, 184. *Hyde* v. *Cooper*, 26 Vt. 552.

But the language generally used by judges and text writers, and such decisions as we have been able to find, is broad enough to cover a case like the present when the ratification is established. *Perley* v. *Georgetown*, 7 Gray, 464. *Bishop* v. *Montague*, Cro. Eliz. 824. *Sanderson* v. *Baker*, 2 Bl. 832; *S. C.* 3 Wils. 309. *Barker* v. *Braham*, 2 Bl. 866, 868; *S. C.* 3 Wils. 368. *Badkin* v. *Powell*, Cowper, 476, 479. *Wilson* v. *Tumman*, 6 Man. & G. 236, 242. *Lewis* v. *Read*, 13 M. & W. 834. *Buron* v. *Denman*, 2 Exch. 167, 188. *Bird* v. *Brown*, 4 Exch. 786, 799. *Eastern Counties Railway* v. *Broom*, 6 Exch. 314, 326, 327. *Roe* v. *Birkenhead, Lancashire, & Cheshire Junction Railway*, 7 Exch. 36, 41. *Ancona*

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v. *Marks*, 7 H. & N. 686, 695. *Condit* v. *Baldwin*, 21 N. Y. 219, 225. *Exum* v. *Brister*, 35 Miss. 391. *Galveston, Harrisburg, & San Antonio Railway* v. *Donahoe*, 56 Texas, 162. *Murray* v. *Lovejoy*, 2 Cliff. 191, 195; see *Lovejoy* v. *Murray*, 3 Wall. 1, 9; Story on Agency, §§ 455, 456.

The question remains whether the ratification is established. As we understand the bill of exceptions, McCullock took on himself to deliver the defendant's coal for his benefit and as his servant, and the defendant afterwards assented to McCullock's assumption. The ratification was not directed specifically to McCullock's trespass, and that act was not for the defendant's benefit if taken by itself, but it was so connected with McCullock's employment that the defendant would have been liable as master if McCullock really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. See *Coomes* v. *Houghton*, 102 Mass. 211, 213, 214; Cooley, Torts, 128, 129. The ratification goes to the relation, and establishes it *ab initio*. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden. In *Gibson's case*, Lane, 90, it was agreed that, if strangers as servants to Gibson, but without his precedent appointment, had seized goods by color of his office and afterwards had misused the goods, and Gibson ratified the seizure, he thereby became a trespasser *ab initio*, although not privy to the misusing which made him so. And this proposition is stated as law in Com. Dig. Trespass, C, 1. *Elder* v. *Bemis*, 2 Met. 599, 605. In *Coomes* v. *Houghton*, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that a subsequent payment for his work by the defendant would not make him one. For these reasons, in the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.

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EDWARD LYNCH *vs.* J. W. MOORE.

Suffolk. November 13, 1890. — September 3, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Evidence.

In an action for an injury inflicted by the defendant's horse on that of the plaintiff, there was evidence tending to show that the horses were left standing in the street facing each other. The defendant called as a witness a member of a firm whose store was near where the plaintiff's horse was wont to stand, who, after testifying that he had often seen this horse as it stood there, but that all he knew of its habits was what he saw it do with the firm's horses, which he generally turned the other way, was asked, "What was the habit of the plaintiff's horse with reference to other horses standing near?" and the evidence was excluded. *Held*, that the evidence should have been admitted.

TORT, for injury to the plaintiff's horse. At the trial in the Superior Court, before *Mason*, J., it appeared that the plaintiff's horse and the defendant's horse were both left facing each other, unattended and unfastened, on Hanover Street in Boston. The evidence introduced by each party tended to show that his horse was approached and interfered with by the horse of the other party; and that the injury in question resulted. The defendant's evidence tended to show that the plaintiff's horse walked up to the defendant's horse, and began to bite his neck in a playful manner, and that in this way the horses and harnesses became entangled, and the injury resulted; and that the plaintiff's horse was apt to step up to other horses standing near and play with them by biting them on the neck. The defendant called one Curtis, who was a member of a firm whose shop was situated near where the plaintiff's horse was accustomed to stand, and he testified that he knew the plaintiff's horse, and had seen it standing there two or three times a week; but that all he knew of the habits of the horse was what he saw it do with the horses of the firm, which he generally turned the other way. The witness was then asked, "What was the habit of the plaintiff's horse with reference to other horses standing near?" Upon the plaintiff's objecting, the evidence was excluded, and the defendant excepted.

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The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The case was argued at the bar in November, 1890, and afterwards, in September, 1891, was submitted on the briefs to all the judges.

J. A. McGeough, for the defendant.

S. J. Thomas, for the plaintiff.

MORTON, J. The only exception taken by the defendant relates to the exclusion of the question to the witness Curtis. The witness had testified that he knew the plaintiff's horse, and had seen it on the stand two or three times a week, but all he knew of its habits was what he saw it do with horses of his own firm, which he generally turned the other way. He was then asked what was the habit of the plaintiff's horse with reference to other horses standing near. We think the question must be understood to mean what were its habits with reference to other horses standing near, so far as the observation or knowledge of the witness went. So understood, we think the witness should have been allowed to answer. The habit of the plaintiff's horse toward other horses standing near was one of the facts in controversy; the plaintiff contending that it could be left standing alone without moving, and the defendant contending that it was apt to step up to other horses standing near and play with them by biting them on the neck.

The fact that the observation or knowledge of the witness of the habits of the plaintiff's horse in this respect was confined to its conduct towards horses belonging to his own firm, would seem to go rather to the weight than to the competency of his evidence. We cannot say that it would be no evidence of a habit on the part of the plaintiff's horse. *Day* v. *Ross*, *ante*, 13. It may be fairly inferred, from the statement of the witness that he generally turned his own horses the other way, that his answer would be material, and favorable to the defendant. For these reasons, a majority of the court think the entry must be,

Exceptions sustained.

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HANNAH F. SAUNDERS *vs.* CHARLES F. SAUNDERS.

Essex. January 21, 1891. — September 3, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Contract — Unascertained Promisee — Right of Beneficiary to sue — Covenant.

A covenant cannot be created to arise wholly in the future between the covenantor and a party who at the time is unascertained, and from whom no consideration is to move, and who is not in any way privy to any present agreement by the covenantor.

CONTRACT, for breach of an agreement under seal. The case was submitted to the Superior Court, upon an agreement that, if the plaintiff was not entitled to maintain her action, judgment was to be entered for the defendant. *Pitman*, J. ordered judgment for the defendant; and the plaintiff appealed to this court. The facts appear in the opinion.

The case was submitted on briefs in January, 1891, and afterwards, in September following, was submitted on the same briefs to all the judges.

W. D. Northend, for the plaintiff.

C. Sewall, for the defendant.

MORTON, J. This action is brought by the plaintiff upon an instrument under seal, to which she is not a party, and of which none of the consideration moved from her. The instrument is signed by Charles F. Saunders, the defendant, and is between him and George M. Saunders, who together, and the survivor of them, were entitled to the income of a trust fund. The consideration is one dollar paid by said George M. Saunders, and like covenants on the part of said George with said Charles to those contained in the instrument declared on. The covenants or agreements in the instrument relied on are as follows: "I, the said Charles F. Saunders, do hereby covenant and agree to and with the said George M. Saunders, and to and with such person as may be the wife of said George M. Saunders at the time of his decease, that if the said George M. shall die in my lifetime, leaving a widow living, I will, from and after the decease of said George M., and during my lifetime, pay over to such person as

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may be the widow of said George M., one third of the entire income aforesaid to which I may be entitled as such survivor." The plaintiff is the widow of George, and it is clear that, so far as she relies upon the covenants and agreements made between her husband and the defendant for her benefit, they will not support this action. It is well settled in this State, in regard to simple contracts, that "a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter." *Exchange Bank* v. *Rice*, 107 Mass. 37, and cases cited. *Rogers* v. *Union Stone Co.* 130 Mass. 581. *New England Dredging Co.* v. *Rockport Granite Co.* 149 Mass. 381. *Marston* v. *Bigelow*, 150 Mass. 45. In regard to contracts under seal, the law has always been that only those who were parties to them could sue upon them. *Sanders* v. *Filley*, 12 Pick. 554. *Johnson* v. *Foster*, 12 Met. 167. *Northampton* v. *Elwell*, 4 Gray, 81. *Flynn* v. *North American Ins. Co.* 115 Mass. 449. *Flynn* v. *Massachusetts Benefit Association*, 152 Mass. 288. The case of *Felton* v. *Dickinson*, 10 Mass. 287, to which this case would seem to be somewhat analogous, is fully explained in *Marston* v. *Bigelow*, *ubi supra*, and is authority only to the extent there indicated.

It is suggested, however, that, somewhat after the analogy furnished by letters of credit, the plaintiff may avail herself of so much of the covenants and agreements as purports to be made "to and with such person as may be the wife of said George M. Saunders at the time of his decease"; that is, that this covenant amounts to a promise on the part of the defendant to whomsoever may be the wife of George M. Saunders at his death, that he will pay her annually thereafter a certain sum so long as he shall live, and that the plaintiff, being the wife of said George, may therefore maintain an action upon it. But it is to be observed that the covenant did not purport to create a present agreement with the person who was the wife of George at the time the agreement between him and the defendant was executed; neither does it purport to be a continuing offer or promise on the part of the defendant, as in the case of a letter of credit or an offer of reward, that, if the person who shall be the wife of George at the time of his decease shall

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do certain things, then the defendant will pay her a certain sum. On the contrary, it was an attempt to create a covenant to arise wholly in the future between the defendant and a party who at the time was unascertained, and from whom no consideration was to move, and who was not in any way privy to the contract between the defendant and said George. We do not think this can be done.

The question whether the administrator or executor of the husband of the plaintiff may not maintain an action on the agreement for her benefit, or whether she may not herself bring suit in the name of the executor or administrator, has not been argued to us, and we have not therefore considered it. For these reasons, a majority of the court think that, according to the agreement, the entry must be, *Judgment for the defendant.*

SOPHIA S. FREEDLEY *vs.* CHARLES W. FRENCH & another.

Suffolk. January 23, 1891. — September 3, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Release — Fraudulent Representations.

On the issue whether a release was procured from the holder of a promissory note by false and fraudulent representations, there was evidence that the indorser's agent presented the release for the holder's signature, saying that the indorser was embarrassed and could not go on without an extension which the paper would grant, but did not state that the paper was a release, and that the holder did not examine the paper or understand that it released the indorser, and would not have signed the paper knowing it to be a release. The presiding judge instructed the jury, that it must appear that there was some concealment of the contract, some act tending to throw the holder off his guard or prevent the reading of the release; and that, if the contents of the release were concealed from the holder, it was not binding. *Held*, that there was evidence for the jury that the holder's signature was procured by fraudulent representations and concealment; and that the reference in the instruction to "concealment" meant clearly such as would result from the contents of the instrument being falsely stated, and afforded no ground of exception.

CONTRACT on a promissory note, dated June 9, 1883, signed by Charles W. French, and made payable to the order of Ferdi nand F. French in one month from date, and indorsed in blank

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by him, and he alone defended. Trial in the Superior Court, before *Staples*, J., who refused to order a verdict for the defendant, but ordered a verdict for the plaintiff; and the defendant alleged exceptions. The case appears in the opinion.

G. L. Huntress, for the defendant.

C. W. Cushing, for the plaintiff.

MORTON, J. The note declared on in this case was originally given to one Frances M. Freedley, now Frances M. Leavitt. It was signed by Charles W. French, was made payable to the order of his brother, Ferdinand F. French, and was indorsed in blank by him waiving demand and notice, and was given by Charles W. to Frances M. Freedley for value. Long after it was overdue, she transferred it to the plaintiff. The maker and indorser were both sued, and the latter alone defends. The defence set up is that in December, 1884, which was after the note was due, and when it was the property of Frances M., she executed a release under seal, in common with other creditors of Ferdinand F., discharging him "from all debts, demands, actions, and causes of action" which they had against him. In reply to this, the plaintiff alleges that Frances M. signed the release without receiving any consideration therefor, in consequence of the false and fraudulent representations of Ferdinand F., or his agent, Charles W., and that the same is not therefore a bar to this action.

The defendant asked the court to rule that there was no evidence of fraud in obtaining the release, and to direct a verdict for the defendant. The court declined so to rule, and submitted the following questions to the jury:

"1. Were the signing and delivering of the instrument in question obtained from Frances M. Freedley by false and fraudulent representations of the defendant's agent, made while acting within the scope of his agency, as to the effect and purpose of said instrument, as alleged, the contents being concealed from her, and she not being negligent in the premises?

"2. Did Frances M. Freedley sign and deliver the paper in question in ignorance of what it contained, not having read the same, or heard it read, and being falsely informed as to its real character, contents, and provisions by the defendant's agent while acting within the scope of his agency.

"3. Did Frances M. Freedley sign and deliver the instrument in question without consideration therefor?

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"4. Did Frances M. Freedley sign the same as a sealed instrument, or without a seal?"

To the first three of these questions the jury answered, Yes, and to the last answered, Without a seal; and the court thereupon directed a verdict for the plaintiff.

Frances M. Freedley, who has become by marriage Mrs. Leavitt, was a witness for the plaintiff, and testified that Charles W. French presented the paper to her for signature, and said that his brother was embarrassed, and, unless his creditors signed the paper giving him more time, he could not keep on with his business; that if he went on with his business it would be all right, his debts and obligations would be paid; and that he would not be able to go on with his business unless his creditors signed the paper giving him time, but if they did it would be all right. She further testified that she thought the paper was not presented to her till after the conversation, and that she took it to her desk and signed it; but afterwards she said she did not remember whether Charles W. French placed it on the desk, or whether she did. She also testified that the paper was not read to her, and she did not examine it, and Charles W. did not state to her that it was a release of the indorser, or that it was a release of Ferdinand F., and the first she knew that it was claimed to be a release was after the suit was brought. In answer to the question, "Did he [Charles W.] say anything about that paper before he left the house?" she replied that he said the interest would be paid, and he asked if she wanted it paid annually or semiannually, and she said it made no difference so it was paid; and in answer to the question, "What did he say about that paper before you signed it?" she said, "The same that I have said." She also testified that the only reason for her signing it was simply that Charles W. asked her, and that she would not have signed the paper if she had known it was a release of the debt. On cross-examination, she said that she could not tell whether Charles W. handed her the paper or not; that she only saw it to sign it; that she could not remember whether the paper was turned over so that she could only see the signatures when she signed; that she did not know that Charles W. made any effort to conceal the paper or what was in it from her, but she did not remember his reading it to her; that she thought it was merely an extension of time;

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and that he said unless they (the creditors) all signed it, the signing of the others would not amount to anything, he could not go on with his business unless it was signed by all. Mrs. Leavitt's testimony was corroborated by that of her husband in the following particulars. He testified that Charles W. "said that his brother was embarrassed, and that he needed time in order to get on his feet again; that this paper gave him that time"; that he thought Charles W. "urged Mrs. Leavitt to make the signature, and that Mr. French placed the document on the table for her to sign," as he remembered it; and that he did not hear the document read, and nothing was said about its being a release. Charles W. testified that he took the paper at the request of Ferdinand F. to Mrs. Leavitt, (then Frances M. Freedley,) and read it and explained it to her, and she then took it into the parlor and sat down at her desk, signed it, and handed it back to him.

The question is not which way the weight of the evidence inclines, but whether there was any evidence for the jury tending to show that Mrs. Leavitt's signature was procured by false and fraudulent representations and concealment. And we are of opinion that there was, and that the case was rightly submitted to the jury.

It is true that Mrs. Leavitt was required to exercise reasonable care in acquainting herself with the contents of the paper, and that she would not be allowed in an action by or against her on a contract to show simply that she was ignorant of its contents when she signed it, and that it was different from what she supposed it to be, and so to avoid its effect. But this rule would be subject to the condition that no fraud was practised upon her for the purpose of procuring, and which resulted in procuring, her signature. *Rice* v. *Dwight Manuf. Co.* 2 Cush. 80. *Leddy* v. *Barney*, 139 Mass. 394. *Jackson* v. *Olney*, 140 Mass. 195. And whether she was negligent or exercised reasonable care was a question of fact for the jury, in considering all the circumstances, to decide. It can hardly be said, as matter of law, that a party is guilty of negligence who signs a paper relying upon the representations as to its contents and effect made by the party presenting it, and without himself examining it. If there may be such cases, this is not one of them. See *Chapman* v. *Rose*, 56

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N. Y. 137; *Foster* v. *Mackinnon*, L. R. 4 C. P. 704; *Putnam* v. *Sullivan*, 4 Mass. 45.

It was competent for the jury to find, upon the testimony of Mr. and Mrs. Leavitt, that the representations and statements made by Charles W. related to the paper which was presented by him for her signature; and if the jury believed their testimony, they were justified in finding that these statements were false and fraudulent, and that he concealed from her the real nature of the instrument to which he was soliciting her signature, and thereby induced her to sign the document. Mrs. Leavitt states expressly that she was induced to sign it by what Charles W. said, meaning evidently what he said to her about his brother's creditors, and the necessity of his having more time, etc. *Trambly* v. *Ricard*, 130 Mass. 259.

The court instructed the jury, among other things, that it must appear that there was some concealment of the contract, some act tending to throw Mrs. Leavitt off her guard or prevent her from reading the release; and that if the contents of the release were concealed from her, it was not binding upon her. The words "concealment" and "concealed" are not used by the court in a sense that implied that the paper was or might have been actually concealed or hidden by Charles W. from the examination of Mrs. Leavitt, for it is evident that there was nothing of the kind, and the jury could not so have understood them. But it is clear that the court meant, and the jury must have understood it to mean, the concealment which would result from his stating the contents of the paper as other than they really were. So construed, the instructions are not objectionable.

The jury having found that the signature of Mrs. Leavitt was procured by the false and fraudulent representations and concealment of Charles W. French, and that she was not negligent in affixing her signature to the paper, and the instructions of the court on this branch of the case being sustained, the findings of the jury on the two remaining questions become immaterial, and the instructions and rulings of the court relating thereto need not be considered. It is not contended by the defendant that they are material, or operated to his prejudice, if the rulings of the court on the other branch of the case are sustained.

The result is, that the *Exceptions are overruled.*

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CHARLES S. LOUD *vs.* CLEMENT F. BARNES & another.

Plymouth. February 27, 1891. — September 3, 1891.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Mutual Mistake — Reformation of Deed — Appeal — Findings of Single Justice.

Upon a bill in equity to reform a deed, so that its northerly line should exclude a building, and its easterly line, which was described as running "west about ten rods" to land of certain heirs, should read "west two rods," it appeared on appeal from a decree of a single justice dismissing the bill, upon a report of the whole evidence, that the oral testimony as to the northerly line was conflicting, and that the only evidence as to the easterly line was the scrivener's testimony that, in copying the description from an earlier deed, he read the word "two" as "ten." In the printed copy of this deed annexed to the report the word was printed "ten," and upon inspection of the deed it was impossible to determine whether the word was intended for ten or two. There was no dispute as to where the land of such heirs was. *Held*, that the decree should not be reversed.

BILL IN EQUITY, filed in the Superior Court, for the reformation of a deed. Hearing before *Bishop*, J., who dismissed the bill; and the plaintiff appealed to this court.

H. H. Pratt, for the plaintiff.

J. M. Day & T. C. Day, for the defendants.

LATHROP, J. This is a bill in equity to reform a deed. The case was heard by a single justice of the Superior Court, who entered a decree dismissing the bill, and the case comes before us on an appeal by the plaintiff, the evidence being reported in full.

On January 19, 1888, the plaintiff conveyed by a warranty deed to the first named defendant and his wife "a certain lot of land, with the buildings thereon, lying on the south side of Centre Avenue in said Abington, containing twenty-five square rods, more or less, bounded and described as follows, viz.: beginning on said street at the northeast corner of land of the heirs of the late Jesse E. Keith, and running thence easterly with said street about eight rods, thence south twenty-five degrees west about ten rods and twenty-four links, to land of the heirs of Asaph Dunbar; thence by said Dunbar land north sixty-eight degrees west about eight rods, to land of Joseph G. and Sophia N. Lowe;

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thence north twenty-five degrees east, by land of said Lowe's and said Keith's heirs, to the first corner." The deed further describes the land as being the same premises conveyed to the grantor by Mary L. Richmond, by deed dated August 5, 1873.

After the conveyance by Richmond, and before the deed by the plaintiff to the defendants, one Giles, claiming to own the land, put up a building, used as a market, on Centre Avenue, and on the land covered by the deed.

The plaintiff seeks to have the deed reformed by having the northerly boundary line described as running, from the point of beginning, "easterly with said street and land of Thomas F. Giles and others, about eight rods," and by having the easterly line described as running "south twenty-five degrees west two rods and twenty-four links, to land of the heirs of Asaph Dunbar."

It is clear that the bill cannot be maintained unless there was a mistake common to all the parties to the deed. *Page* v. *Higgins*, 150 Mass. 27. The description of the northerly line in the deed corresponds exactly with the description of the same line in the deed from Richmond to the plaintiff. The only ground for contending that there was a common mistake is, that the plaintiff's evidence tends to show that the bounds of the land were pointed out by the plaintiff to the first named defendant, and that these bounds would bring the northerly line in the rear of the building used for a market. While the defendants admit that certain bounds were pointed out, their testimony tends to show that such bounds would include the building used as a market, and that the northerly boundary line was on Centre Avenue.

The witnesses in this case testified orally in the Superior Court. In cases of this sort, the decree appealed from will not be reversed on a question of fact, unless it clearly appears to the appellate court to be erroneous. The justice who heard the case saw the witnesses, and could judge better than we can of the degree of credibility to be given to their testimony. *Chase* v. *Hubbard*, 153 Mass. 91, and cases cited.

After an examination of the testimony, we are unable to say that the justice who heard the case erred in refusing to allow the deed to be reformed in this respect.

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In regard to the easterly line, which is described as running "about ten rods and twenty-four links, to land of the heirs of Asaph Dunbar," and which the plaintiff contends should be "about two rods and twenty-four links," it appears that the length of this line, according to the plaintiff's contention, should be forty-nine feet, and, according to the defendants' contention, about seventy-two feet. While it is obvious that the word "ten" does not accurately describe the length of the easterly line, we find no evidence in the report bearing directly upon the question whether the word "two" should be substituted for "ten," except the testimony of the scrivener who drew the deed, who testifies that he copied the description in the Richmond deed, and that he read the word "two" as "ten." In the printed copy of the Richmond deed annexed to the report this word is printed "ten." By consent of counsel, the original Richmond deed has been furnished us, and, on inspection, it is impossible to determine whether the word is intended for ten or two.

The length of the easterly line is not a matter of importance, except as it bears upon the first question discussed. The line runs, in a certain direction, from the northeast corner of the land conveyed to the land of the heirs of Dunbar. There is no dispute as to where this land is, and, as a monument, it controls any distance stated in the deed.

On all the evidence in the case, we are of opinion that the decree must be, *Affirmed.*

GEORGE W. GALVIN *vs.* MARY A. PARKER.

Suffolk. March 5, 1891. — September 3, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Dog — "Owner or Keeper" — Several Liability — Election.

Under the Pub. Sts. c. 102, § 93, making the "owner or keeper" of a dog liable for injuries caused by it, the owner and keeper are not jointly and severally liable as tortfeasors; and, after the recovery of a judgment for such an injury

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against one of them, which remains unsatisfied by reason of his taking the poor debtor's oath, an action cannot be maintained against the other for the same injury.

TORT, to recover damages for injuries resulting from the bite of a dog. Trial in the Superior Court, without a jury, before *Bishop*, J., who refused to rule that the plaintiff, having obtained judgment against the owner of the dog for the same injuries, was precluded thereby from recovering against the defendant as keeper, and found for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in March, 1891, and afterwards was submitted on the briefs to all the judges.

J. Cummings, for the defendant.

F. A. Farnham, for the plaintiff.

MORTON, J. This is an action brought under the Pub. Sts. c. 102, § 93, for injuries received from a dog. The plaintiff contends that the owner and keeper are jointly or severally liable, and that having sued the owner and obtained a judgment which is still unsatisfied by reason of the defendant in that action having taken the poor debtor's oath, he can, under *Elliott* v. *Hayden*, 104 Mass. 180, sue the defendant as keeper, and, if he obtains judgment, collect it. The provision of the statute is, that "every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him." The language, it will be observed, is "every owner *or* keeper" (the Italics being our own), and an examination of the other provisions of c. 102 relating to dogs shows that the same phraseology is carefully preserved in all of them where owner and keeper are spoken of. Thus in § 80, which relates to licensing, the words are "every owner or keeper." The lists which assessors are required to make out are of "owners' or keepers' names" (§ 89). The provision in regard to the killing of a dog that is assaulting a person or worrying certain animals speaks of "its owner or keeper," and so on (§§ 94, 95). See §§ 96, 97, 103, 106, and 109. An examination of earlier statutes shows the uniform use of the same language. Gen. Sts. c. 88, § 59. Rev. Sts. c. 58, § 13. St. 1791, c. 38. St. 1798, c. 54, § 3. St. 1812, c. 146, § 3. We can but think that this strict adhesion for so long a time to the phrase indicates a purpose on the part of the Legis-

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lature not to make the owner and keeper jointly or severally liable, or both jointly and severally liable.

When the Legislature seeks to make parties jointly or severally liable, or both, it uses apt words for that purpose, as in the Pub. Sts. c. 100, § 21, where it expressly provides that certain persons shall be "liable severally or jointly" with certain other persons. On the other hand, it does not seem probable that the Legislature, when it provided that the "owner, tenant, or occupant" of a gaming house should be liable to an action, intended without anything more a joint or several or successive liability. Pub. Sts. c. 99, § 2. The statute enlarges the liability of the owner or keeper of a dog, and renders it unnecessary for the plaintiff to show that the dog was dangerous and known to be so; and it would seem that, if the Legislature had also intended to give the injured party a joint or several remedy against the owner and keeper, it would have said so. The fact that this appears to be the first instance in which the liability now asserted has been claimed, would also appear to give some force to the construction which we adopt.

The object of the statute would appear to be to give to the injured party a remedy against the owner or keeper, but not against the owner and keeper jointly or severally, or to make them liable as independent wrongdoers, the owner for owning and the keeper for keeping the dog. If the injured party is in doubt on the question of ownership, he may bring his action on the other ground, namely, of keeping; but having decided which party to pursue, he cannot after judgment obtained against one, in case he fails to collect his judgment, resort to the other. This is no more of a hardship to him than it is to any party to be compelled to elect between different remedies. If it should seem desirable to make the owner and keeper liable jointly and severally, or severally, it is easy for the Legislature to do it.

Exceptions sustained.

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REGINALD E. DANIELS *vs.* NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Suffolk. March 10, 1891. — September 3, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Personal Injuries — Negligence — Railroad Turn-table — Implied Invitation — Child — Trespass.

A boy, attracted to railroad premises by a turn-table thereon left unlocked or unguarded near a public highway, or in an open and exposed position near the accustomed or probable place of resort of children, cannot recover for personal injuries sustained while at play upon the turn-table, either on the ground of an implied invitation to come there, or of a duty on the part of the corporation to refrain from ordinary negligence in its management of the turn-table.

TORT, for personal injuries occasioned to the plaintiff, a child ten years and ten months old, while playing upon a turn-table connected with the defendant's railroad in Dedham.

At the trial in the Superior Court, before *Mason*, J., there was evidence tending to show that the turn-table was situated near the populous part of Dedham, and about one thousand feet from a public school located on an adjoining street, which the plaintiff attended; that the turn-table, as shown by a plan used at the trial, was upon the railroad location, and was distant between five hundred and six hundred feet from Dwight Street on the north, and about six hundred feet from Metcalf Street on the south, both of which crossed the railroad at grade, and about two hundred feet from Willow Street on the west, which ran parallel with the railroad tracks; that the turn-table was in plain sight of these streets, having large upright standards or guys twelve to fifteen feet in height, which could be seen for a considerable distance; that the Dedham station was situated on the line of the railroad about one thousand feet northeasterly from the turn-table beyond Dwight Street; that the defendant's roadbed, both beside and between the tracks, was used as a common thoroughfare from the grade crossing on Metcalf Street northerly towards the station, and had been so used for many years; that on April 24, 1888, the day of the accident, the turn-table was unlocked and unfastened, with no guards or notices thereon

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to prevent accident, except that it was provided with a bolt to keep it in place while locomotive engines were passing to and from it; that, when unlocked and unfastened, it was capable of being turned around by children of the size and age of the plaintiff and his companions; that the bolt on the turn-table was attached to a lever moved by a handle, which was placed above the turn-table in plain sight, and this handle was easily and frequently moved by boys of the same size and age; that children had been in the habit of playing on the turn-table, and boys had been seen to turn it without being warned by the defendant's workmen employed about the turn-table; that in the afternoon of that day, after the close of school and shortly before the accident, the plaintiff with other boys went to the station to see a train come in; that they asked the train-men, who were switching cars on the tracks adjacent to the turn-table, to let them ride; that the train hands refused them permission to ride on the cars, and told them to stand off the track while the cars were being switched, but did not order them to leave the railroad or to keep off the turn-table; that the boys thereupon went to the turn-table and began to turn it around, and to ride thereon; and that, after riding around several times, the plaintiff's foot was caught, and he was injured.

Upon this evidence, the judge ruled that the plaintiff was not entitled to maintain the action, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

E. W. Burdett & C. A. Snow, for the plaintiff.

R. D. Weston-Smith, for the defendant.

LATHROP, J. The plaintiff does not contend that he had any express invitation from the defendant to enter upon its premises, but that he was enticed or allured by the attractiveness of the turn-table; and the proposition of law upon which he relies is, that if a railroad company leaves a turn-table unlocked or unguarded upon its own premises, near a public highway, or in an open or exposed position near the accustomed or probable place of resort of children, it is for the jury to determine, even in the absence of other evidence as to the attractive nature of the turn-table, whether it is, in and of itself, calculated to attract children, and whether a child injured upon it was in fact attracted or allured by it; that, if so allured or attracted, the child comes

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upon the premises of the railroad company through its implied invitation or inducement, and is not a bare licensee or trespasser; and that the company owes to such child the duty to refrain from ordinary negligence with respect to the condition and management of its turn-table.

The turn-table is stated in the exceptions to have been five or six hundred feet from a highway crossing the railroad, and six hundred feet from another highway crossing. Shortly before the accident, the plaintiff and some other boys were at a station on the railroad, which appears by a plan used at the trial to have been about one thousand feet from the turn-table; that they then asked some train men, who were switching cars on the tracks adjacent to the turn-table, to let them ride on the cars, and, on being refused, went to the turn-table. The only thing stated in the exceptions to show that the turn-table was attractive, is that it had large upright standards or guys, twelve to fifteen feet in height, which could be seen from a considerable distance.

The cases upon which the plaintiff relies may be divided into two classes. Those of the first class rest upon the proposition that, if a turn-table is of a dangerous nature and character when unlocked or unguarded, in a place much resorted to by the public, and where children are wont to go and play, it is the duty of the railroad company owning the turn-table to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded. *Stout* v. *Sioux City & Pacific Railroad*, 2 Dillon, 294; *S. C. nom. Railroad Co.* v. *Stout*, 17 Wall. 657. The decision of the Supreme Court of the United States was apparently approved in *Atchison & Nebraska Railroad* v. *Bailey*, 11 Neb. 332; and followed in *Evansich* v. *Gulf, Colorado, & Santa Fe Railway*, 57 Tex. 123; *Houston & Texas Central Railway* v. *Simpson*, 60 Tex. 103; *Gulf, Colorado, & Santa Fe Railway* v. *Styron*, 66 Tex. 421; and *Gulf, Colorado, & Santa Fe Railway* v. *McWhirter*, 77 Tex. 356. See also *Bridger* v. *Asheville & Spartanburg Railroad*, 25 S. Car. 24; *Ferguson* v. *Columbus & Rome Railway*, 75 Ga. 637, and 77 Ga. 102.

The second class of cases proceeds upon the doctrine of constructive invitation; that is, that if a person is allured or tempted

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by some act of a railroad company to enter upon its land, he is not a trespasser, and it is held that leaving a turn-table unguarded is such an act. *Keffe* v. *Milwaukee & St. Paul Railway*, 21 Minn. 207. *O'Malley* v. *St. Paul, Minneapolis, & Manitoba Railway*, 43 Minn. 289. *Kansas Central Railway* v. *Fitzsimmons*, 22 Kans. 686. *Nagel* v. *Missouri Pacific Railway*, 75 Misso. 653.

The decision of the Supreme Court of the United States in *Railroad Co.* v. *Stout* rests upon the proposition stated by Mr. Justice Hunt, "that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts."

The cases cited in support of this proposition are *Lynch* v. *Nurdin*, 1 Q. B. 29, *Birge* v. *Gardiner*, 19 Conn. 507, *Daley* v. *Norwich & Worcester Railroad*, 26 Conn. 591, and *Bird* v. *Holbrook*, 4 Bing. 628.

With the exception of *Daley* v. *Norwich & Worcester Railroad*, all of these cases come within other rules, or within well defined exceptions to the general rule that a landowner owes no duty to a trespasser, except that he must not wantonly or intentionally injure him or expose him to injury.

Lynch v. *Nurdin*, *ubi supra*, rests upon the doctrine that, if a person unlawfully places an obstruction in a way, he is liable to a child who is injured thereby, although the child wrongfully meddles with the obstruction. The contrary, however, was held in *Hughes* v. *Macfie*, 2 H. & C. 744, and in *Mangan* v. *Atterton*, L. R. 1 Ex. 239. In *Lane* v. *Atlantic Works*, 111 Mass. 136, the plaintiff was found to be without fault, and not a trespasser. See also *Clark* v. *Chambers*, 3 Q. B. D. 327; *Powell* v. *Deveney*, 3 Cush. 300.

Birge v. *Gardiner*, *ubi supra*, rests upon the doctrine that an owner of land has no right to use his land near a highway in such a manner as to make it a public nuisance. To the same effect is *Hydraulic Works* v. *Orr*, 83 Penn. St. 332.

Bird v. *Holbrook*, *ubi supra*, decides that a landowner cannot lawfully, without giving notice, set traps upon his own land for the purpose of injuring trespassers; and that, if a person is injured by such a trap, he may recover. And in Connecticut the

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rule is held to be the same, though no notice is given. *Johnson* v. *Patterson*, 14 Conn. 1. This, as pointed out by Morton, J., in *Marble* v. *Ross*, 124 Mass. 44, 49, proceeds upon the ground that the owner of land cannot wantonly injure a trespasser. The case of a trespasser injured by a vicious animal stands upon the same footing. *Marble* v. *Ross*, 124 Mass. 44.

The owner of land adjoining a public street is undoubtedly liable for an excavation made by him therein, if the land, with his consent, has for a long time been used by the public as a street. *Larue* v. *Farren Hotel Co.* 116 Mass. 67. *Beck* v. *Carter*, 68 N. Y. 283.

The case of *Daley* v. *Norwich & Worcester Railroad*, *ubi supra*, so far as it tends to support the result reached in *Railroad Co.* v. *Stout*, *ubi supra*, must be considered as overruled by *Nolan* v. *New York, New Haven, & Hartford Railroad*, 53 Conn. 461.

The Court of Appeals of New York has stated, in a well considered case, that it does not uphold the decision in *Railroad Co.* v. *Stout*, and, although it seeks to distinguish that case from the one before it, the difference between the two cases is not very apparent. *McAlpin* v. *Powell*, 70 N. Y. 126. In this case the plaintiff's intestate, a boy in his tenth year, stepped out of a window of the house in which he lived upon the platform of a fire escape, and fell through a trap-door therein which was insecurely fastened. The defendant was the landlord of the house, and it was his duty to keep the fire escape in order. It was held that he owed no duty to one who was using the fire escape for his own pleasure; and that the defendant was not liable.

In *Frost* v. *Eastern Railroad*, 64 N. H. 220, the plaintiff, a boy seven years of age, was injured while playing upon a turn-table of the defendant's railroad. The ground upon which he sought to recover was, that he was attracted to the turn-table by the noise of boys playing upon it. The turn-table was on the defendant's land, about sixty feet from a public street, in a cut with high, steep embankments on each side, and was insecurely fastened. It was held that the plaintiff was but a trespasser; and that, under the circumstances, the defendant owed him no duty. The court expressly refused to follow the case of *Railroad Co.* v. *Stout*, *ubi supra*. On the question whether the defendant was liable on the ground of an implied invitation, Clark, J., in deliv-

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ering the opinion of the court, said: "One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or enclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

Subject to the exceptions we have before stated, and to some others which it is not necessary more particularly to refer to, an owner of land may use his land in such manner as he sees fit; and if a trespasser or mere licensee is injured, he cannot complain that, if the owner had used it in a more careful manner, no injury would have resulted. *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 731, and cases cited. *Clark* v. *Manchester*, 62 N. H. 577. *Klix* v. *Nieman*, 68 Wis. 271. *Gramlich* v. *Wurst*, 86 Penn. St. 74. *Cauley* v. *Pittsburgh, Cincinnati, & St. Louis Railway*, 95 Penn. St. 398. *Gillespie* v. *McGowan*, 100 Penn. St. 144. *Hargreaves* v. *Deacon*, 25 Mich. 1. See also *Sweeny* v. *Old Colony & Newport Railroad*, 10 Allen, 368; *Metcalfe* v. *Cunard Steamship Co.* 147 Mass. 66, and cases cited; *Barstow* v. *Old Colony Railroad*, 143 Mass. 535.

In *Johnson* v. *Boston & Maine Railroad*, 125 Mass. 75, the plaintiff bought a ticket of the defendant corporation which entitled her to be carried from Boston to Lawrence. She went as far as Somerville, a way station, and there left the cars and went to a house near by, intending to take a later train for Lawrence. After remaining at the house for a while, she returned to the station, and, while crossing the tracks to the station of another railroad corporation, to meet her son, was injured. The space between the two stations was partly planked and partly filled in with earth, so as to form a convenient passageway; and evidence was offered that a large number of passengers were in the

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habit of using this space as the plaintiff was using it, and that no notice or warning to the contrary had been posted. It was held that the evidence failed to show that the defendant held out any inducement to the plaintiff to enter its premises; that the use of the premises as a passageway by strangers was a matter in which the defendant was absolutely passive, and from which nothing was to be inferred in favor of or in aid of the plaintiff; and that the plaintiff was a mere intruder, and could not recover. See also *Wright* v. *Boston & Maine Railroad*, 129 Mass. 440.

In *Morrissey* v. *Eastern Railroad*, 126 Mass. 377, a child four years of age was run over by the cars of a railroad corporation, while using the track as a playground. There was a footpath across the track which was used by persons, but in which the plaintiff had no rights, and by which he got upon the track. Evidence was offered that the defendant had been notified that the place was dangerous for children, and had been requested to place a fence across the path. The court held that the plaintiff was a mere trespasser upon the track; that no inducement or implied invitation had been held out to him; and that he could not recover. There was some evidence in this case that the engineer acted maliciously, or with gross and wilful carelessness; and this question was submitted to the jury, who found for the defendant.

In *Wright* v. *Boston & Albany Railroad*, 142 Mass. 296, there was a well defined path leading to a railroad track, and an opening in a ridge near the track, and a passageway for the path through the ridge. There was no fence or obstruction to prevent persons from going on the track from the path, and when freight cars stood on the track an opening opposite the path was sometimes left. This path had been used by persons to cross the track, and no objection had been made by the defendant's servants to persons crossing there, except when cars were approaching. The plaintiff, a boy between six and seven years of age was injured while going to school and crossing the track by the path. It was held that these facts would not warrant the jury in finding that the defendant had held out an inducement or invitation to the plaintiff to use the path to cross the track.

The case of *McEachern* v. *Boston & Maine Railroad*, 150 Mass. 515, came up on a demurrer to the declaration, which alleged, in

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substance, that the defendant, a railroad corporation, left a car standing on one of several side tracks adjoining a public street; that the defendant knew that one of the doors of the car was insecurely fastened, and was liable, upon receiving a slight touch, to fall to the ground; that the defendant well knew that said car "then was, and would be, an enticing, attractive, and inviting object to children, and well knowing that children then were, and long prior thereto had been, accustomed to play in, upon, around, and about such cars as might happen from time to time to be placed upon any of said side tracks"; that the plaintiff, being then upwards of eleven years of age, was travelling upon the street in the vicinity of the side track upon which the car was standing, "and saw said car with its open door, and was thereby enticed and invited to look into said car, and thereupon did undertake to look into said car, exercising therein as much care as could reasonably be expected of a child of his years and capacity; and that in attempting to look into said car he carefully touched said door, and immediately said door fell upon him," and injured him. The demurrer was sustained, on the ground that the plaintiff was a trespasser, committing an unlawful act in meddling with the defendant's car; that he was not invited or enticed there by the defendant; and that the defendant owed him no duty to have the car safe for him to visit.

In *McCarty* v. *Fitchburg Railroad*, *ante*, 17, a child about five years old strayed from the yard of the house in which it lived on to a street, and thence into the freight yard of a railroad corporation, where it was injured. The freight yard was parallel with the street, and there was no fence between. It was held, in the absence of evidence that a fence was required by the Pub. Sts. c. 112, § 115, that it did not appear that there was any evidence of a breach of any duty which the defendant owed the plaintiff.

The cases which we have last cited are conclusive of the one at bar, whatever may be the rule elsewhere. The plaintiff was a mere trespasser upon the land of the defendant. We find no evidence of any invitation by the defendant or inducement held out to him to go there, and no evidence of a breach of any duty which it owed him. The Superior Court rightly directed a verdict for the defendant. *Exceptions overruled.*

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JAMES CARSTAIRS & others *vs.* MARY O'DONNELL & another.

Suffolk. March 18, 1891. — September 3, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Intoxicating Liquors — Importation — Original Package — Recovery of Price.

The price of intoxicating liquors, shipped by non-resident dealers to their agent in this State in accordance with a contract of sale made by him before the passage of the U. S. St. of August 8, 1890, and delivered in the original package upon their arrival upon such agent's order to the purchaser here pursuant to the sale, is recoverable of the purchaser by such dealers, whether the sale was made in this State or in that of the shipment, and whether the sellers and their agent had a license to sell intoxicating liquors here or not.

CONTRACT, to recover the price of five barrels of whiskey, sold by the plaintiffs to the defendants. Writ dated May 10, 1889.

At the trial in the Superior Court, before *Hammond*, J., it appeared in evidence that the plaintiffs were non-residents, having their usual place of business in the city of Philadelphia, and that they sold the whiskey in question to the defendants, and had not been paid for the same; that the whiskey was sold to the defendants, whose place of business was in Boston, through one Woodbury, an agent of the plaintiffs having a place of business in Boston, who notified the plaintiffs of the sale; that the whiskey was sent by the plaintiffs from Philadelphia, in accordance with the notice from Woodbury, by a common carrier selected by the plaintiffs, and delivered at the defendants' place of business in Boston at the plaintiffs' request, the last delivery being in April, 1889; and that the whiskey when delivered to the defendants was in the original unbroken package in which it was shipped from Philadelphia.

The defendants offered to show that the contract for the whiskey was made with Woodbury in Boston, and that it remained the property of the plaintiffs until it reached the defendants' place of business in Boston; and that neither the plaintiffs nor Woodbury had any license or authority to sell intoxicating liquors in Boston.

The judge ruled that, if the jury were satisfied that the defendants received the whiskey under the contract, the plaintiffs

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were entitled to recover, notwithstanding the fact that they had no license, if they delivered the whiskey in the same unbroken package in which it left Philadelphia, and, the defendants not desiring to go to the jury on the question whether the whiskey was thus delivered in the original package, ordered a verdict for the plaintiffs; and the defendants alleged exceptions.

H. F. Naphen, for the defendants.

J. L. Powers, for the plaintiffs.

MORTON, J. Whether the sale was made in Boston or in Philadelphia, and whether the plaintiffs and their agent in Boston did or did not have a license to sell intoxicating liquors in Boston, were immaterial. It was in evidence that the liquor was shipped by the plaintiffs, who were not residents of Massachusetts, from Philadelphia to their agent in Boston, pursuant to a contract which he had made with the defendants in Boston for the sale of the liquor to and its purchase by them, of which he notified the plaintiffs; and that the agent caused the liquor on its arrival at Boston to be delivered to the defendants, pursuant to said sale, in the same original unbroken package or barrel in which it had been shipped from Philadelphia. The case comes precisely within *Leisy* v. *Hardin*, 135 U. S. 100, and *Lyng* v. *Michigan*, 135 U. S. 161, which have been cited with approval in *McCall* v. *California*, 136 U. S. 104, 110, and are binding upon this court, although the opinion in each case was that of a majority of the court, and strong dissenting reasons were given. See *Commonwealth* v. *Gagne*, 153 Mass. 205; *State* v. *Pfleajor*, 81 Iowa, 759; *State* v. *Caldwell*, 81 Iowa, 759. The case is not affected by the act of Congress of August 8, 1890, as that was not passed till more than a year after the last sale. See *Commonwealth* v. *Calhane*, *ante*, 115.

Exceptions overruled.

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RICHARD P. HALLOWELL *vs.* BLACKSTONE NATIONAL BANK.

Suffolk. March 20, 1891. — September 3, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Pledge by Partner — Non-performance of Promise — Sale of Collateral — Application of Proceeds to Firm Debt.

Shares of stock were pledged by a member of a firm to secure a loan to him from a bank, then holding the firm's acceptances. He gave the bank a demand note made out upon a printed form furnished by it, reciting that "on the non-performance of this promise" the bank might sell the stock and apply "the net proceeds to the payment of this note," accounting to him "for the surplus, if any"; and that "such surplus, or any excess of collaterals upon this note," should be applicable "to any other note or claim against me held by said bank." Upon a demand he made partial payments, but failed to pay the residue, requesting the bank to make the balance a time loan, which the bank refused, it being understood, however, that the demand should not be pressed without further notice. This notice the bank gave, and, upon non-payment, sold the stock for an amount sufficient to pay what was due on the note, and leave a balance in its hands. *Held*, that there was a non-performance of the promise contained in the note, which entitled the bank to sell the shares. *Held, also*, that the bank could apply the balance in its hands to the payment of the firm acceptances remaining unpaid.

BILL IN EQUITY, filed in this court on October 4, 1890, to redeem certain shares of stock pledged by Joseph W. Smith to the defendant bank as security for a loan. The case was heard by *Field*, C. J., and was as follows.

On December 3 and 8, 1888, the defendant bank discounted two drafts, amounting to $11,127, which had been accepted by the firm of Glidden and Curtis, of which Smith, as the bank knew, was a member. On December 14, 1888, Smith borrowed $25,000 of the defendant bank and gave therefor his promissory note, and deposited as collateral security the shares in question, which were named in the note and were his individual property. This note, which was signed by Smith, was made out upon a printed form, then commonly used by the defendant bank when lending money on a note with security, and furnished by it and filled up by its president, and was so far as material as follows, the printed words and figures being in Roman letters, and the written in Italics:

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"25,000 dollars. cts. Boston, Mass., *Dec. 14*, 1888. On demand, after date, with interest at per cent, *I* promise to pay to the Blackstone National Bank of Boston, or order, at said bank, *Twenty-five Thousand* $\frac{x}{100}$ Dollars, for value received, having deposited with this obligation as collateral security *149 Shares Smith & Dove Man'g Co., 200 Shares Pacific Guano Co.*, with authority to sell the same, or any collaterals substituted for or added to the above, without notice, either at public or private sale or otherwise, at the option of the said Blackstone National Bank, on the non-performance of this promise, said bank applying the net proceeds to the payment of this note and accounting to *me* for the surplus, if any; and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against *me* held by said bank."

Shortly before January 3, 1889, the defendant bank demanded payment of Smith, who on that day paid the defendant $5,000, and again on January 5 following $5,000 more, at the same time requesting the bank to make the balance a time loan, which the bank refused, it being understood, however, that the claim should not be pressed without further notice, although the bank retained the right to require the payment of such balance at any time. On February 7, 1889, Smith made an assignment for the benefit of creditors to the plaintiff, and shortly thereafter notified the defendant bank of that fact. On March 15 following, the plaintiff offered to pay the balance due on the note, conditioned upon the defendant's surrendering the security; but the defendant refused to do so, claiming the right to hold what was not necessary to pay the note as security for the acceptances of Glidden and Curtis, which it still owned and which were unpaid. Thereafter, on March 26, the defendant, having demanded payment of the plaintiff, which was refused because it would not deliver up such security, sold the stock of the Smith and Dove Manufacturing Company for $17,898.63, which was a fair market price. There was no objection made to the sale, if the bank had the right to sell the stock. After paying the note, with interest and the expenses of the sale, there was left a surplus of $2,568.88 in the hands of the defendant, together with the shares of the stock of the Pacific Guano Company.

Upon these facts, the judge ruled that there was a non-per-

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formance of his promise by Smith; that the bank therefore had a right to sell the stock, and that the plaintiff's offer to pay, being conditional upon a surrender of the security, was not sufficient to enable him to maintain this bill on his contention that there had been no non-performance of Smith's promise; and the plaintiff excepted.

The judge then reported the case for the consideration of the full court, upon the question whether, by the terms of the note, the surplus proceeds of the stock sold and the stock remaining unsold, or either of them, might be applied by the defendant to the acceptances, and also upon the question raised by the plaintiff's exception; such decree to be entered as justice might require.

The case was argued at the bar in March, 1891, and afterwards, in September following, was submitted on the briefs to all the judges except *Field*, C. J.

J. B. Warner, for the plaintiff.

F. E. Fitz, for the defendant.

HOLMES, J. This is a bill to redeem certain stock given by one Smith, the plaintiff's insolvent, to the defendant, as collateral security for a loan to Smith. The main question is whether the defendant can hold the stock as security not only for the loan mentioned, but also for two acceptances of a firm of which Smith was a member, which acceptances the defendant had discounted before the date of the loan in question. The note given by Smith for the loan authorizes the defendant to sell the stock "on the non-performance of this promise, said bank applying the net proceeds to the payment of this note and accounting to me for the surplus, if any." It then goes on, — and these are the important words, — "and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against me held by said bank."

The counsel for the plaintiff based his argument on the proposition that the right to apply the excess of collaterals to any other note or claim was conditional upon Smith's non-performance of his promise. We think it doubtful at least whether that is the true construction of the words which we have quoted. We are disposed to read the agreement as an absolute pledge or mortgage of the securities for other notes and claims. But if this be not so, we are of opinion that Smith did not perform his promise

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within the meaning of the note. The bank demanded payment of Smith on January 3, 1889, and he made partial payments, but failed to pay the residue, and requested the bank to make the balance a time loan, which the bank refused. This was a non-performance of his promise by Smith. It is true that the report states that it was understood that the demand should not be pressed without further notice. But this did not take away the effect of the breach. It merely called on the bank to give notice before taking further steps, such as selling the security, and this it did. We neither construe the report as meaning, nor do we infer from it, that the breach of Smith's promise by his failure to pay on demand was waived by the bank. On January 3, if not before, the bank's right vested to apply any excess of collaterals upon other claims.

The question remains whether the bank is entitled to hold the security for the bills which were accepted by Smith's firm, and not by him individually. It cannot be denied that the acceptances were "claims against him," or that the words used in his note were broad enough to embrace firm acceptances unless there is some reason in the context, the circumstances, or mercantile practice, to give them a narrower meaning. *Singer Manuf. Co.* v. *Allen*, 122 Mass. 467. *Chuck* v. *Freen*, Mood. & Malk. 259. If Smith had had private dealings and a private account with the bank as a depositor, and his firm also had had dealings and an account there, and Smith had given security in the terms of his note in order to be allowed to overdraw or to obtain a discount, it may be that the generality of the language would be restrained to the line of dealings in the course of which it is used. *Ex parte M'Kenna* (*City Bank case*), 3 DeG., F. & J. 629. See Lindl. Part. (5th ed.) 119, and note. But we are called on to construe a printed form used by the bank and presented by it for those who borrow from it to sign. The question is what is the reasonable interpretation of such words, when insisted on as a general formula to be used by would be borrowers, irrespective of any special course of business of the particular person who signs it, which, for the matter of that, there does not appear to have been in this case. For all that appears, the note mentioned may have been the only transaction that ever took place between the defendant and the plaintiff's insolvent alone.

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The printed form, it may be assumed, would have been used by the bank equally in a case where the borrower was the principal man in his firm and the only one known to the bank, was borrowing for his firm daily, and had never borrowed for himself but in this instance, and in a case where the borrower's membership in a firm whose notes the bank held was unknown. This being so, in the opinion of a majority of the court there is no sufficient reason for not giving the words their full legal effect. The clause pledging the property for any other claims against the debtor is not inserted with a view to certain specific debts, but as a drag-net to make sure that whatever comes to the creditor's hands shall be held by the latter until its claims are satisfied. Cory on Accounts and Lindley on Partnership have made it popular to refer to a mercantile distinction between the firm and its members. But we have no doubt that our merchants are perfectly aware that claims against their firms are claims against them, and when a merchant gives security for any claim against him and there is nothing to cut down the literal meaning of the words, he must be taken to include claims against him as partner.

Decree accordingly.

FRANCIS V. BALCH & others *vs.* WILLIAM H. PICKERING & others.

Suffolk. June 27, 1891. — September 3, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Will — Residuary Clause — Aleatory Gift.

A testator, by his will, after giving his only son one half of one seventh of the income of a trust fund, and each of his six daughters one seventh and one sixth of one half of one seventh of the same, provided that, "if any one or more of my said daughters or son shall decease, leaving no child or children living at the time of such decease, the principal sum of which such deceased daughter or son may have had the income for life shall be distributed to the surviving daughters and son; that is to say, the income for their several lives, and the principal to their children, as above provided and arranged." The son and the daughters survived the testator, and the son then died leaving one child, and subsequently one of the daughters died childless. *Held*, that the son's child was entitled to

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share in the principal of the share of which the deceased daughter received the income; and that this right was not modified by a codicil which increased the son's share of income to one seventh.

BILL IN EQUITY, filed in this court on February 13, 1889, by the trustees under the will of Daniel Hammond, for instructions as to the disposition of a trust fund. The case was heard and reserved for the consideration of the full court, and was as follows.

The will of Daniel Hammond, which was dated March 4, 1854, after various legacies and a provision for three annuities, contained the following, which alone is material:

"Fifth. Subject to said three annuities, and as the same shall be extinguished, I direct and appoint that my trustees, annually, or at such less periods of time as the receipts of income will permit, shall pay and distribute to my six daughters, each one seventh and one sixth of one half of one seventh, share and share alike, of the entire income and interest of my estate, for and during the term of their several natural lives, as and for their sole and separate use, devested of any and every marital right of any husband present or future which they or either of them now or hereafter may have, but not subject by them or either of them to anticipation by way of sale or otherwise; deducting, however, from the share of each all and every sum with which they may severally be charged upon my books or papers as an advancement, so that my daughters may have an equal interest in my estate. And I direct that the income of one half of one seventh of my estate shall annually, or at such less periods of time as the income of my estate will permit, be paid by my trustees to my son George Hammond, without any deduction for advances heretofore made to or for his use, which difference between him and my daughters is made as I have heretofore advanced and paid for him and on his account large sums of money. And I further direct and appoint that my trustees shall convey, assign, and pay over to the children of my daughters and son, from time to time, as such decease shall severally occur, the principal sum or share of which the income for life is herein to said daughters and son severally given. And if any one or more of my said daughters or son shall decease, leaving no child or children living at the time of such decease, the

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principal sum of which such deceased daughter or son may have had the income for life shall be distributed to the surviving daughters and son; that is to say, the income for their several lives, and the principal to their children, as above provided and arranged."

By the fourth codicil to the will, dated November 27, 1868, the testator provided as follows:

"First, I give and devise to my son George Hammond one seventh instead of and as a substitute for the one half of one seventh given to him in and by my said will; the effect of which is to deduct from the provision therein made for my daughters severally one sixth each of one half of one seventh."

George Hammond, the son of the testator, and his six daughters, one of whom was Sally S. Pickering, all survived him, and afterwards George died, leaving a son, the defendant George Francis Hammond. Subsequently Sally S. Pickering died, leaving no child or children or issue living at the time of her decease, but leaving George Francis Hammond and her five sisters and their issue surviving.

George Francis Hammond contended that he was entitled to one sixth part of the share of the estate of his grandfather, Daniel Hammond, of which his aunt, Sally S. Pickering, late deceased, had the income during her life.

The surviving sisters of Sally S. Pickering and their issue contended that they, the sisters, were entitled each to one fifth part of the income of the share of the estate of Daniel Hammond of which the said Sally S. Pickering had the income during her life, and that their children would be entitled to the principal sum after their decease.

R. Olney, for the surviving sisters and their issue.

H. G. Allen & W. R. Howland, for George Francis Hammond.

HOLMES, J. This is a bill, brought by the trustees under the will of Daniel Hammond, for the construction of the latter part of the fifth article of his will. The testator left one son and six daughters. One daughter, Sally S. Pickering, has died, leaving no child living at the time of her death. The son had died before her, leaving one child, the defendant George Francis Hammond. The question is whether this defendant is entitled to a share in the principal of the share of which Sally Pickering

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received the income. The words to be construed are "if any one or more of my said daughters or son shall decease, leaving no child or children living at the time of such decease, the principal sum of which such deceased daughter or son may have had the income for life shall be distributed to the surviving daughters and son; that is to say, the income for their several lives, and the principal to their children, as above provided and arranged."

The literal meaning of the words is, that, when a child of the testator shall die leaving children, the latter shall receive the principal sum of which their parents had received the income, and thereupon their interest in the joint fund shall cease, although, as the result of such cessation, they may happen to lose the secondary and accidental advantage of sharing in the division of some other child's share if another child of the testator should chance to die later and leave no children of his or her own. See *In re Horner's estate*, 19 Ch. D. 186; *In re Benn*, 29 Ch. D. 839.

On the other hand, there is the same unlikelihood that the testator intended an aleatory gift, which has led to the statutory construction against joint tenancies. Probably the testator did not have it in mind to deprive any set of grandchildren of this secondary advantage because of the previous death of their parent. If that is the result of the words used, it is an accidental result, not the object of his disposition. The general purpose manifested is that the grandchildren should stand as well with regard to the principal as their parent stood with regard to the income, and that the division between the different branches of the testator's family should be equal, taking advances into account. It should be added, that, so far as the present question is concerned, the different branches stand exactly alike, — the children of daughters equal *per stirpes*, and the child of the son equal to the children of a daughter. If the literal meaning of the words is adopted, then, if the last sister who died should leave no children living, the limitation would fail altogether, and there would be an intestacy, as the fifth article is a residuary clause.

Although I have not been able to free my mind from doubt, the latter considerations have prevailed with the court in favor

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of equality of distribution, and against the disinheritance *pro tanto* of grandchildren whose parents were not living. We read the last words of the fifth article as meaning that the income of their proportion of the deceased child's share shall be paid to the other children of the testator who are alive, and that the principal of a like proportion shall be paid to the children of his other children who are dead, as well as to the children of the surviving children when the latter shall die. Whether the interest of grandchildren would be devested by death before the death of the childless daughter, we need not determine. See *Minot* v. *Taylor*, 129 Mass. 160; *Bowker* v. *Bowker*, 148 Mass. 198; *In re Bowman*, 41 Ch. D. 525.

We cannot agree that the effect of the will is modified by the fourth codicil, giving to the testator's son George one seventh, instead of the one half of one seventh, given him by the will.

Decree accordingly.

ANDREW J. FISKE *vs.* DANIEL S. PRATT.

Middlesex. March 9, 1891. — September 5, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Written Instrument — Promissory Note — Indorser — Notice of Non-payment.

A written instrument contained a promise "to pay to A. J. F. & Co. at their office" a certain sum in four months after date, upon the "agreement of the promisor and the indorsers of this note" that it should be held subject to a certain contract, "the signatures of said promisor and said indorsers to this note" being their assent to an addition to what was due on the contract. The instrument bore the following, "Indorsed by S. B. P., party to contract"; and the contract, to which S. B. P., a woman, was a party, provided for her indorsement of "the original note." *Held*, that, whether she was technically an indorser or not, her responsibility was not greater than if she was an indorser; and that she was entitled to notice in case of non-payment by the principal promisor.

CONTRACT, against "Daniel S. Pratt, as he is executor of the will and estate of Susan B. Pratt." The declaration was as follows: "And now comes the plaintiff and says that Daniel S. Pratt made a promissory note, a copy whereof is hereto annexed, marked A, payable on the terms and conditions con-

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tained in the contract, a copy whereof is hereto annexed, marked B; and the said Susan B. Pratt, deceased, indorsed said note, (see copy of indorsement on back of said note,) and the said Susan B. Pratt became and was a joint promisor; that the plaintiff is the owner of said note, and this defendant as administrator owes the plaintiff the amount thereof, and interest thereon." The copy marked A was as follows:

"$351.14. Wellesley Hills, March 5, 1884. Four months after date, I promise to pay to A. J. Fiske & Co. at their office in West Newton, Mass., three hundred and fifty-one $\frac{14}{100}$ dollars, same being for amount of balance of $219.49, now due upon the contract made with A. J. Fiske, October 30th, 1882, and including also the amount of said Fiske & Co.'s bill to November 23d, 1883, for roofing and sundries, amounting to $131.65, upon the express understanding and agreement of the promisor and the indorsers of this note that it shall be held and carried upon the terms and conditions of said contract of October 30th, 1882, and in no other way. The signatures of said promisor and said indorsers to this note being by mutual agreement their assent to the addition of said $131.65 to the balance now due on said contract, and incorporated in this note as part of said contract from March 5th, 1884, until paid in full."

This instrument bore the following: "Indorsed by Susan B. Pratt, party to contract." The contract referred to in the declaration, and annexed thereto and marked B, was dated October 30, 1882, and was between Andrew J. Fiske, party of the first part, Daniel S. Pratt, party of the second part, and Susan B. Pratt, party of the third part, and contained the following: "The said Fiske, the party of the first part, in consideration of one dollar, and for the further consideration of a certain promissory note payable to him, signed by the said Daniel S. Pratt of the second part, and indorsed by the said Susan B. Pratt of the third part, dated October 30th, 1882, running four months from that date, and amounting to three hundred thirty-two $\frac{64}{100}$ dollars, receipt of both of which is hereby acknowledged, doth hereby covenant and agree with the parties of the second and third parts that he will, at the maturity of the said note, (at the end of four months from its date,) renew the same, and will continue to renew it from time to time in the manner herein-

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after specified during the full term of three years from the date of this instrument and said note. . . . And the said Susan B. Pratt of the third part hereby agrees to indorse the original note for three hundred thirty-two $\frac{64}{100}$ dollars, and its renewals during three years, with the express understanding and agreement of said Fiske, that her liability in consequence of such indorsement shall be limited to thirty-three dollars for each four months note or twenty-five dollars for each three months note."

The defendant demurred to the declaration, on the ground, among others, that it did not appear from the declaration that "due notice of the non-payment of the note declared on was ever given to the defendant or his testator."

The Superior Court sustained the demurrer, and the plaintiff appealed to his court.

The case was submitted on briefs in March, 1891, and afterwards, in July following, was submitted on the same briefs to all the judges except *Field*, C. J.

H. H. Mather, for the plaintiff.

C. E. Washburn, for the defendant.

ALLEN, J. It is not necessary to determine whether the instrument declared on is or is not properly described in the declaration as a promissory note. The instrument itself being fully set forth by copy, together with the original contract under which it was given, and which is therein referred to, the undertaking of the defendant's testate may be ascertained, and it appears to us that the responsibility which she assumed was no greater than that of an indorser of a note. By the original contract she agreed to indorse the note. The instrument called a note twice refers to indorsers, and her signature is prefixed by the words "indorsed by." Whether technically an indorser or not, her responsibility is no greater than if she was an indorser. It is as if she stipulated for notice in case of non-payment by the principal promisor. She was entitled to such notice. There being no averment that such notice was given, the demurrer was properly sustained.

Judgment for the defendant affirmed.

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WILBUR H. POWERS *vs.* JEROME F. MANNING.
SAME *vs.* SAME.

Suffolk. March 12, 13, 1891. — September 5, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, MORTON, & LATHROP, JJ.

Promissory Note — Commencement of Action — Account annexed — Alabama Claim — Commissioners' Fees — Practice — Attorney and Counsellor.

An action may be brought upon a promissory note which by its terms is payable "when the United States pays judgments" under §§ 5 and 8 of the U. S. St. of June 5, 1882, upon the "Alabama Claims in the so called class 2 cases," if the United States has in the main paid all judgments of the first class in full, and over thirty-five per cent of the greater part of those of the second class, and has substantially exhausted the fund.

A single charge for services by an attorney, in writing different letters upon the same day and relating to the same subject matter, may be inserted in one item of an account annexed.

Section 847 of the U. S. Rev. Sts. regulating "commissioners' fees" relates to the commissioners appointed by the Circuit Courts of the United States under § 627, and does not affect a private agreement between an attorney and a commissioner appointed by the Court of Commissioners of Alabama Claims, providing for a certain charge per day for taking depositions.

Instructions issued by the Court of Commissioners of Alabama Claims to commissioners appointed and authorized to take testimony to be used in the trial of causes pending therein, which were not put in evidence at the trial of an action brought by such a commissioner for his services in such a cause, will not be first received at the argument in this court of exceptions taken at such trial.

An attorney who, for good cause, but without the consent of the court or of his client, withdraws from the conduct of a suit then upon the trial list, in which his client has other counsel, is not thereby precluded from recovering for his previous services in the suit.

TWO ACTIONS OF CONTRACT, by an attorney at law and commissioner of the Court of Commissioners of Alabama Claims, to recover upon promissory notes and on an account annexed for services rendered in connection with claims before that court. At the trial without a jury, in the Superior Court, *Sherman*, J. found for the plaintiff, and allowed a bill of exceptions in each case, which, so far as material to the points decided, appear in the opinion.

J. F. Manning, pro se.

H. L. Boutwell, (*N. Currier* with him,) for the plaintiff.

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LATHROP, J. These are two actions of contract, tried in the Superior Court, without a jury. In each case the presiding justice found for the plaintiff; and the case comes before us on the defendant's exceptions.

The first count in the first case is on a promissory note, dated July 11, 1884, by the terms of which the defendant promised to pay the plaintiff the sum of $685, "when the United States pays judgments of the Court of Commissioners of Alabama Claims in the so called class 2 cases."

The defendant asked the court to rule that this note did not become due and payable until the United States had paid all such judgments in full, and that this action as to said note had been prematurely brought. The court refused so to rule, as it appeared at the trial that the United States had substantially paid all judgments of the first class in full, and had paid 35.22 per cent of the greater part of the judgments of the second class, and substantially exhausted the fund.

The Court of Commissioners of Alabama Claims was constituted by the U. S. St. of June 23, 1874, for the purpose of receiving and examining all claims admissible under the act resulting from damage caused by the Alabama and other designated Confederate cruisers. The claims allowed by this tribunal did not equal the amount of the award of the arbitrators appointed in pursuance of the Treaty of Washington between the United States and Great Britain, and which had been paid to the United States.

The Court of Commissioners of Alabama Claims having ceased to exist, Congress, by the act of June 5, 1882, re-established it for the term of two years. By § 4, it was authorized to receive and examine the claims mentioned in § 5, and to enter judgments for the amounts allowed therefor in two classes. Section 5 defines the claims of the two classes. Section 7 provides that the judgments rendered by the court under the act shall be paid by the Secretary of the Treasury out of the sum of money paid to the United States under the Treaty of Washington, and not appropriated to claims proved under preceding legislation. Section 8 provides that "judgments entered in the first class shall be paid before judgments of the second class are paid. If the sum of money so unappropriated shall be insufficient to pay

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the judgments of the first class, they shall be paid according to the proportions which they severally bear to the whole amount of such unappropriated sum. If such sum shall be sufficient to pay the judgments of the first class and not sufficient to pay the judgments of the second class, the latter judgments shall be paid according to the proportions which they severally bear to the residue of such unappropriated sum after the judgments entered in the first class are paid." 22 U. S. Sts. at Large, 98.

Construing the condition contained in the note in suit, and the finding of the court in connection with the terms of this statute, we are of opinion that the ruling requested was rightly refused.

The award of the arbitrators was to the United States as a nation, and the fund was "to be distributed by Congress as it saw fit. . . . No individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund." *Williams* v. *Heard*, 140 U. S. 529, 537, 538. When, therefore, the note in suit was made payable "when the United States pays judgments of the Court of Commissioners of Alabama claims in the so called class 2 cases," the parties to the note had reference to claims which could be enforced only under the terms of the statute, which were to be paid out of a specific fund, in subordination to cases of the first class, and which were in a certain contingency to be paid proportionally.

The remaining exception in the first case may be briefly disposed of. The second count is on an account annexed, which contained over twenty items. The defendant objected to several of these items on the ground that the plaintiff sought in each of them to recover for services in several different matters, and the defendant asked the court to rule that the plaintiff could recover for but one matter of charge under each of said items, and also asked the court to rule that there could be no recovery on any of said items. The court found upon the evidence, as a fact, that the different matters mentioned in each of said items constituted one item of charge upon the same subject matter; and refused to give the rulings requested. One of these items is as follows: "1885, Dec. 8. To letter to Payson & Speer, and two page letter to Brigham, $3."

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If these letters related to the same subject matter, we are unable to see why one charge might not be made, and why, being so charged, they could not be inserted in one item. The other items are similar, and fall within the same rule.

The case of *Jones* v. *Ilsley*, 1 Allen, 273, on which the defendant relies, is clearly distinguishable. The defendant in that case filed a declaration in set-off, one item of which was as follows: "To goods sold, materials found, and work done, $100." At the hearing before an auditor, the defendant introduced evidence of several distinct matters of charge under said item. At the trial this item was disallowed. In delivering the opinion of this court, Chapman, J. said: "The item in the account in set-off, 'To goods sold, materials found, and work done, $100,' should not have been entirely rejected. In many cases, all these particulars may enter into a single item of charge. And any single thing of which that item gives reasonable notice might have been proved. But it appears that the auditor allowed the defendant to prove several particulars, with the various prices of the same, under this single item. This was erroneous. Under a single item of his bill, the defendant should have been limited to the proof of a single article."

In the second case, one of the counts was on an account annexed, in which the plaintiff sought to recover on an oral agreement made between himself and the defendant, by which the defendant promised to pay him at the rate of twenty dollars a day for every business day in which he was engaged in taking depositions, as a commissioner appointed by the Court of Commissioners of Alabama Claims, for the defendant. Other counts were upon promissory notes, the consideration of which was services rendered as such commissioner and as an attorney.

The charges for such services are found by the court not to conform, either in form or amount, to the provisions of the U. S. Rev. Sts. § 847. The defendant asked the court to rule "that the plaintiff, as commissioner of the Court of Commissioners of Alabama claims, was a public officer; that the fees to which he was entitled for services as such commissioner were regulated by the Revised Statutes of the United States, § 847; and that he can recover no more fees than those prescribed in the said section, even though the defendant expressly agreed to pay him

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more; and also that, having made a special contract in reference to his fees, which is opposed to public policy, the plaintiff cannot recover on a *quantum meruit*." The court refused so to rule, and found for the plaintiff.

Section 847 of the U. S. Rev. Sts. is entitled "Commissioners' Fees," and prescribes what are the legal fees of such persons. Section 823 of the same chapter provides: "The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the Circuit and District Courts, marshals, commissioners, . . . except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties."

The commissioners mentioned in the above sections are undoubtedly the commissioners authorized by § 627 of the U. S. Rev. Sts. to be appointed by each Circuit Court. This was expressly so decided by Judge Choate in *Sedgwick* v. *Grinnell*, 10 Bened. 6, and is apparent from a consideration of all the provisions of the chapter. Thus, by § 846, the accounts of "commissioners of Circuit Courts" are required to be examined and certified by the district judge of the district for which they are appointed. The fees which are allowed them by § 847 are for services imposed upon commissioners of the Circuit Court by other sections of the Revised Statutes.

We are of opinion, therefore, that the fees of the plaintiff, as commissioner, are not regulated by the U. S. Rev. Sts. § 847. It is accordingly unnecessary to determine whether the words, in § 823, "the following and no other compensation shall be taxed and allowed to . . . commissioners," refer to anything more than the costs which may be taxed for their services, or to their claims against the government of the United States when acting in a judicial or ministerial capacity, and prevent them from making a contract for services on such terms as may be agreed upon.

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At the argument in this court, the defendant produced a certified copy of certain instructions which, on June 5, 1883, the Court of Commissioners of Alabama Claims directed its clerk to issue "to commissioners appointed and authorized to take testimony to be used in the trial of causes pending before it." We declined to receive this copy, being of the opinion that, if the instructions had any bearing upon the question of the power of the parties to make the alleged contract for fees, they should have been put in evidence at the trial of the case. We see no reason to change our views.

The plaintiff also seeks to recover, on an account annexed, for services rendered to the defendant, as an attorney and counsellor at law in the courts of this Commonwealth, and in the Circuit Court of the United States for the District of Massachusetts.

The plaintiff testified that he withdrew from the defendant's service as attorney and counsellor at law on February 2, 1886, and on that day gave the defendant and all his opponents notice in writing of his withdrawal; that the case of Amy against Manning was then upon the trial list; that Charles Cowley, Esq. also appeared for the defendant; and that such withdrawal was without the consent of the court or of this defendant. The defendant asked the court to rule that the plaintiff was not entitled to recover in this action for any services performed by him in defending the action of Amy against Manning in this court, because he withdrew therefrom before the trial thereof, without the consent of the defendant or of the court; also that the same rule of law applied to all actions pending where the defendant was a party and the plaintiff was his counsel, when the plaintiff withdrew therefrom. The judge found from the evidence that the conduct of said Manning was such that the plaintiff was fully justified in withdrawing from said suits, and that said Manning had other counsel, and suffered no damage on account of said withdrawals; and declined to give the rulings requested.

The defendant relies, in support of his proposition that an attorney cannot withdraw his appearance for a party without leave of court, upon the case of *United States* v. *Curry*, 6 How. 106, where language to this effect is used by Chief Justice Taney. The point decided in that case was that the citation or notice of an appeal might be served upon the attorney of record

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of the appellees, while his name remained upon the docket of the court below, although he had in fact been discharged by his clients. The remark of the Chief Justice is not to be taken as the statement of a general principle, apart from the question before the court. That it was not so intended is shown by the context. The entire quotation is as follows: "So, too, as to the service of the citation on the attorney. It is undoubtedly good, and according to the established practice in courts of chancery. No attorney or solicitor can withdraw his name, after he has once entered it on the record, without the leave of the court. And, while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself." See also *De la Pole* v. *Dick*, 29 Ch. D. 351; 3d Common Law Rule of this Court; 23d Equity Rule.

No case has been called to our attention which holds that, as between an attorney and his client, leave of court is required before a contract between them can be ended.

It is stated in 1 Tidd Pr. (9th ed.) 86, that "when an attorney once appears, or undertakes to be attorney for another, he shall not be permitted to withdraw himself; and it is said to be his duty to proceed in the suit, although his client neglect to bring him money," citing 1 Sid. 31. This, however, is not the law of England or of this country to-day.

The question was thoroughly considered in England in the case of *Vansandau* v. *Browne*, 9 Bing. 402, and it was held that an attorney might, for reasonable cause and upon reasonable notice, abandon the conduct of a case, and recover his fees. In regard to the case in Siderfin, Tindal, C. J. said: "Now, in the report in Siderfin, no facts are stated to explain the decision of the court. It may be, probably was the fact, that the attorney on the very day of the assizes deserted the conduct of the cause, giving his client neither time nor opportunity to obtain other professional assistance: if so, the decision of the court was proper." See also *Rowson* v. *Earle*, Mood. & Malk. 538; *Wadsworth* v. *Marshall*, 2 Cr. & J. 665; *Whitehead* v. *Lord*, 7 Exch. 691; *Harris* v. *Osbourn*, 2 Cr. & M. 629.

In *Eliot* v. *Lawton*, 7 Allen, 274, it was held, in accordance with the English decisions, that the contract of an attorney with

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his client was an entire and continuous contract, and that the statute of limitations did not begin to run until the final service was performed. In answer to the objection, that, by holding the service to be entire, the attorney would be precluded from enforcing any claim for services until the final termination of the suit, Mr. Justice Dewey, in delivering the opinion of the court, said: "To this it has been answered that such would be the effect if nothing has occurred to change the relation of the parties and their duties to each other; but from the nature of this contract it may be terminated previous to the termination of the suit, for a good and sufficient cause, and upon reasonable notice. Hence it has been holden that failure to supply reasonable funds, or any other substantial cause for not further proceeding in the case, would justify the attorney in withdrawing from it, and in such a case a present right to enforce his claim for past services would arise, and of course also from that period the statute of limitations would commence running."

In *Rush* v. *Cavenaugh*, 2 Penn. St. 187, which was an action for slander, the plaintiff, an attorney, collected a sum of money for the defendant, and retained it for his fees. The defendant thereupon called him a thief, robber, and cheat. One question raised was whether the plaintiff, who had been employed by the defendant to prosecute a person criminally, was entitled to any fees, having abandoned the prosecution. It was held that, if he were satisfied of the innocence of the accused, he was entitled to abandon the prosecution, and recover compensation; and that he was not, to quote the language of Gibson, C. J., "bound to give credence to the instructions of a heated client, rather than to the sober testimony of a dispassionate witness."

In *Tenney* v. *Berger*, 93 N. Y. 524, it was held that the employment by the client, without the consent of his attorney, of counsel against whom the attorney had personal and professional objections, and with whom he was unwilling to be associated, was a justifiable cause for his withdrawal from a case; and that, upon reasonable notice of such withdrawal, he was entitled to recover for services rendered.

In the case at bar, we are of opinion that, on the facts found, the presiding judge rightly refused to rule as requested by the defendant.

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The only remaining exception relates to a promissory note payable "when the United States pays judgments of the Court of Commissioners of Alabama Claims." This is disposed of by the conclusion we have reached on a similar question in the first case.

The result is, that in each case the order must be,

Exceptions overruled.

WILLIAM B. GIBSON, appellant.

Berkshire. September 8, 1891. — September 21, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Guardian of Minor — Notice of Appointment — Adoption of Illegitimate Child — Notice to Father.

Publication of notice is not essential, under the Pub. Sts. c. 139, §§ 2, 3, to the validity of an appointment by the Probate Court of a guardian for a minor under fourteen years of age.

Notice to the father of an illegitimate minor of an application for its adoption is not required by the statutes of this Commonwealth; the written assent thereto of its guardian is sufficient.

APPEAL by William B. Gibson, administrator with the will annexed of the estate of Origen A. Gibson, from a decree of distribution made by the Probate Court upon the petition of a person alleging that she was the adopted daughter of the testator, by which the residue of the estate in the administrator's hands, amounting to $3,467.77, was ordered to be paid to her. The case was submitted to this court, and, after an order affirming the decree of the Probate Court, to the full court, upon agreed facts, in substance as follows.

The petitioner was an illegitimate child, and was born in Sheffield in March, 1859. On April 2, 1861, after the death of her mother, Albert Gardner was appointed her guardian without any notice of his application therefor having been published. On July 17, 1861, the testator and his wife filed a petition in the Probate Court for leave to adopt the petitioner, to which her guardian assented in writing; and the petition was granted on the same day, without any notice by publication or otherwise

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to her or to her parents or relatives or next of kin, and without the consent to the petition of any other person than Gardner. The testator died on August 21, 1888, leaving no issue him surviving, and by his will gave the sum of one hundred dollars to his "adopted daughter," meaning the petitioner, and left the rest of his property to his wife, who died before him leaving no issue. The natural father of the petitioner was said to be living in the county at the time of her adoption, but never married the petitioner's mother, or in any way contributed to the support of the mother or of the petitioner. The petitioner contended that she was entitled to the entire estate of the testator, as his only heir at law.

H. C. Joyner, for the appellant.

A. C. Collins, for the petitioner.

BARKER, J. If the petitioner to whom the decree awarded the personal estate of the testator was his legally adopted child, the decree was right.

The act of adoption was in 1861, upon a petition to the Probate Court by the testator and his wife, assented to in writing by one Gardner, as guardian of the petitioner, who was then four years of age, the decree of adoption having been made, without the service or publication of any notice, on the day of the presentation of the petition. The child was illegitimate, and her mother, to whom her father was never married, was dead. Her father is said to have been living in the same county, but never to have contributed to her support or to that of her mother. The agreed facts do not state that he was ever adjudged to be the father of the child, or that he ever acknowledged her as his child. Gardner had been appointed by the Probate Court as her guardian, upon his own petition, and without any publication of notice, three months before the date of the adoption, but after the death of her mother.

The appellant contends that the appointment of the guardian was void for want of notice, and that the adoption was invalid because the consent of Gardner was thus of no effect, and because no notice of the proceedings was given to the father.

Without passing upon the question whether either the guardian's appointment or the adoption could be declared invalid in this proceeding, we are of opinion that Gardner was legally appointed, and that the adoption was valid.

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1. By the Gen. Sts. c. 109, § 2, then in force, the Probate Court was empowered to nominate and appoint a guardian for any minor under the age of fourteen years. The statute did not in terms require any notice of the proceedings, or any nomination or consent on the part of the minor or of any person. We see no reason why, in such cases, notice should be held to be essential to the validity of the proceedings, and the history of the legislation on the subject, in connection with the decisions and practice, confirms this view. The judges of probate were empowered by the St. of 1783, c. 38, §§ 1, 2, to appoint guardians for minors and for insane persons. In neither case did the statute in terms require notice. The provisions regulating the appointment of guardians for minors have remained substantially the same. Rev. Sts. c. 79, §§ 2, 3. Gen. Sts. c. 109, §§ 2, 3. Pub. Sts. c. 139, §§ 2, 3. In practice it has never been considered essential that notice should be given in the case of a minor under the age of fourteen years. But in the case of insane persons this court held, in *Chase* v. *Hathaway*, 14 Mass. 222, 224, that, notwithstanding the silence of the statute, no decree made under it assigning a guardian for an idiot or lunatic could be valid unless the party to be affected had had an opportunity to be heard. This decision was placed upon the ground that, whenever the Legislature has provided that on account of crime or misfortune the public safety demands a suspension of the essential rights of the individual to the enjoyment of his liberty and property, "and has provided a judicial process, by which the fact shall be ascertained, it is to be understood as required that the tribunal, to which is committed the duty of inquiring and determining, shall give opportunity to the subject to be heard in support of his innocence or his capacity." But in the case of a minor of tender years, whose person is by the law presumed to be in the care and custody of parents or other guardians, and who has not the right of dealing with his own property, these considerations do not apply. When the statutes relating to guardians were revised by the Commissioners, under the resolve of February 4, 1832, the provisions relating to minors were left substantially unchanged, and did not in terms require notice. But a new section was reported, the substance of which was enacted in the Rev. Sts. c. 79, § 9, requiring notice to a person supposed to be

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insane, of which the commissioners say, "This section is founded on the opinion of the court in *Chase* v. *Hathaway*, 14 Mass. 222." Commissioners' Report on the Revision of 1834, c. 79, § 10, and note. This requirement of notice in the case of insane persons has since remained; Gen. Sts. c. 109, § 8; Pub. Sts. c. 139, § 7; while, as we have seen, no similar provision has been inserted with respect to minors. We are of the opinion, therefore, that notice is not essential to the validity of such an appointment. Notice may of course be ordered by the Probate Court, if deemed advisable in any case, and a guardian *ad litem* might properly be appointed to represent the minor, if that court thought it best; but neither is essential to the validity of the appointment.

2. It follows that the written assent of Gardner as guardian was a sufficient consent to the petition for adoption, unless the child had a living parent in the sense of that word as used in the Gen. Sts. c. 110, §§ 1–10, then in force. We think that the word "parent" as there used has its legal signification, and is intended to designate only the lawful father or the mother. There is no reason why the Legislature should confer upon the father the right to notice in such cases. He has no right to the custody of the child, or to the use or control of its estate. He is at most a putative father in reputation only, but not in law. A bastard is in law *quasi nullius filius*, and therefore he is called *filius populi*, the child of the people: "*Cui pater est populus, pater est sibi nullus et omnis. Cui pater est populus, non habet ille patrem.*" Co. Lit. 123 a. The signification of the word "parent" in the St. of 1875, c. 99, has been discussed to some extent in the case of *McNeil* v. *Collinson*, 130 Mass. 167, 169, an action of tort given by the statute to a "parent or guardian." The action was brought by the mother as parent, and the absence of evidence that the boy had no father, and of evidence showing why such father did not or should not bring the suit, was insisted upon in defence. The court held that it could not know judicially that there was a father, or even that there ever was a legitimate father, and that it did not appear that the plaintiff was ever under coverture, thus implying that unless the child was legitimate the father would not be a parent in the sense of that statute.

We note that after the provisions of the General Statutes regu-

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lating the adoption of children were repealed, and superseded by the St. of 1871, c. 310, this act was amended by a provision (St. 1872, c. 311, § 3) that nothing contained in it should be construed to require notice to the father of an illegitimate child, and also that when the subject of adoption was again dealt with, in the St. of 1876, c. 213, which is substantially re-enacted in the Pub. Sts. c. 148, the language was explicit in requiring the consent of the lawful parents, or, if the child was illegitimate, of the mother only. St. 1876, c. 213, § 2. Pub. Sts. c. 146, § 2. These provisions are, in our opinion, consistent with our construction. We think that the St. of 1872, c. 311, § 3, was intended merely to declare the law as it already existed; the subsequent enactments would of course follow the law so declared. In our opinion, notice to the father of a bastard of a petition for its adoption has never been required by our statutes.

The result is, that the petitioner was the legally adopted child of the testator, and that the decree of the Probate Court was right. *Decree of distribution affirmed.*

GUSTAVE LEISTRITZ *vs.* AMERICAN ZYLONITE COMPANY.

Berkshire. September 8, 1891. — September 15, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Evidence — Dangerous Machine — Instructions.

In an action for personal injuries sustained by a boy between eighteen and nineteen years old in the defendant's mill, the plaintiff, after testifying that he told the foreman immediately after the accident that it was caused by a machine at which he was set to work by the sub-foreman, cannot be permitted to testify that the foreman then said to the plaintiff that it was just like the sub-foreman to set him at work at a dangerous machine he did not know anything about.

In an action for personal injuries by a boy between eighteen and nineteen years old, after a long examination of the plaintiff as a witness in the presence of a jury, questions to other witnesses, as to whether the plaintiff was above or below the average intelligence of a boy of his age, were *held* to be properly excluded.

An employer cannot be held liable for his failure to instruct an employee respecting dangerous work which he is not expected to do.

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TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. At the trial in the Superior Court, before *Barker*, J., the plaintiff, in the course of a long examination as a witness, testified that he began to work for the defendant in its mill in October, 1889; that he was eighteen years of age, and was hired to work upon a machine called a crusher, by which the hard stock used in the mill was softened; that two workmen were needed to run a crusher, one in putting in stock at the top and the other in taking it away at the tail end, and it was his work to take away stock at the tail end; that on the morning of June 30, 1890, after having been at work with one Kelly upon a crusher, one Rolf, the sub-foreman, told them to go to work on a cutting machine which consisted of rollers and revolving knives; that they did so, Kelly feeding the machine, which was the dangerous part of the work; that, after working up the material, they ceased to work on the cutter, and Kelly went into another room; that subsequently another workman named Frilley and himself cut up a batch of material without orders, Frilley feeding the machine and he taking away the material when cut; that then he returned to the crusher, when Rolf said to them, "Gus, you and Frilley go and cut up stock"; that they returned to the cutting machine, and he attended to feeding the material into it, and Frilley took care of it when cut; and that, upon his pushing a portion of the material too far, the rollers caught the tips of his fingers and drew in his hand, and he received the injuries in question. On cross-examination, he testified that he had never before worked on this cutting machine; that Kelly and two other workmen previously had stopped him from working at feeding it; and that he knew that the rollers would draw in his fingers, but thought that, if his fingers got caught, he could pull them out.

The plaintiff also testified, that after the accident happened he was taken to the office of one Pierce, the foreman, and Pierce asked him how the accident happened, and he told him. The plaintiff was then asked what Pierce said, it being proposed to show that Pierce said, "It was just like Rolf to set you at work at a dangerous machine you did not know anything about." The judge excluded the question, upon the defendant's objection, and the plaintiff excepted.

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Two other witnesses for the plaintiff were asked, in the course of their examination, whether the plaintiff was "above or below the average intelligence of a boy of his age." The judge, upon the defendant's objection, excluded this question; and the plaintiff excepted.

The judge ruled that the action could not be maintained upon the evidence, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

G. A. Prediger, for the plaintiff.

A. J. Waterman & F. R. Shaw, for the defendant.

ALLEN, J. 1. The question to Pierce was properly excluded. So far as appears, his only knowledge of the circumstances of the accident came from what the plaintiff had just told him. If he said that it was just like Rolf to set the plaintiff at work at a dangerous machine he did not know anything about, the statement so far as it involved matters of fact rested wholly upon what the plaintiff had just told him; and so far as it involved matter of opinion, the defendant was not bound by it.

2. Two witnesses were asked whether the plaintiff was "above or below the average intelligence of a boy of his age." His age was eighteen years and eight months. The questions were properly excluded. They did not go to the extent of showing that he was manifestly incapable of understanding the risk without instruction, so that the defendant knew, or from his appearance ought to have known, that cautions and instructions were necessary. *Ciriack* v. *Merchants' Woolen Co.* 151 Mass. 152. The case does not call for any nice consideration of what might be shown in the case of a young child, or under other circumstances. It is enough to say, that under the circumstances of the present case, in view of the plaintiff's age, and of his long examination as a witness in the presence of the jury, the questions were of no material significance.

3. The ruling that there was not sufficient evidence to warrant the jury in finding a verdict for the plaintiff was clearly right. There was nothing to show that he had ever been set to work feeding such a machine, which was the only dangerous part of the work. He testified himself that three different workmen had stopped him from working at feeding. Rolf did not tell him to feed the machine, and there was no evidence that Rolf

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knew that the plaintiff had taken or was likely to take any other than his usual place at the other end of the machine. Without entering upon other considerations, we see no evidence of negligence on the part of the defendant. There was no need of instructing the plaintiff as to work which he was not expected to do. *Exceptions overruled.*

First National Bank *vs.* Eugene C. Watkins.

Berkshire. September 8, 1891. — September 15, 1891.

Present: Allen, Holmes, Knowlton, & Barker, JJ.

Promissory Note — Contract — Consideration — Defence — Circuity of Action.

An offer, made by the holder of a promissory note secured by a mortgage of personal property to the maker, after an assignment by him of his interest therein, to look to the mortgaged property alone for payment of the note when due, becomes, if the maker abstains to his detriment from taking measures to have the property applied to such payment, a completed contract, which rests upon a sufficient consideration, and is available in defence to an action on the note against the maker, to avoid circuity of action.

Contract, upon a promissory note for five hundred dollars, dated October 29, 1887, and made payable on March 1, 1888, and signed by the defendant. Writ dated December 11, 1890. The answer set up, among other things, that the defendant gave the note for money borrowed by him of the plaintiff bank, and executed and delivered a mortgage of personal property as collateral security therefor; that before the note became due the defendant sold his interest in said property to a third person subject to the mortgage, having theretofore informed the plaintiff that he was about to sell the same; that the plaintiff assented to the sale, and agreed to collect the note by a foreclosure of the mortgage and a sale of the mortgaged property if the purchaser thereof did not pay the same at maturity; that the defendant was induced to sell such mortgaged property by this undertaking and agreement of the plaintiff; that the plaintiff neglected to foreclose the mortgage deed at maturity, at which time the property was sufficient in value to pay the note, but

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extended the note, and the property depreciated in value, and the security was lost; and that the plaintiff, having by its own negligence and contrary to its express agreement lost such security and prevented the defendant from realizing enough from the same to pay the note, ought not to be allowed to recover anything of the defendant in the action.

At the trial in the Superior Court, before *Braley*, J., the defendant offered to prove that the note was made to one Benedict by the defendant, and a mortgage of personal property given to secure the note; that Benedict indorsed the note to the plaintiff bank, and made over his interest in the mortgage to it, and thereupon both became the property of the plaintiff; that the defendant afterwards sold his equity in the mortgaged property to a third person, and the plaintiff bank then agreed with the defendant that it would look to the mortgaged property alone for payment of the note; that the plaintiff afterwards extended the time for the payment of the note, without the knowledge or request of the defendant; that on April 4, 1890, the sum of $178.15, the amount realized from the foreclosure and sale of the mortgaged property was paid and indorsed upon the note; and that at the time of the maturity of the note the mortgaged property was of more than sufficient value to pay the same.

The judge ruled that, if the defendant proved what was stated in his offer of proof, it would not amount to a defence to the action, and ordered a verdict for the plaintiff, and reported the case for the determination of this court. If the ruling was right, the verdict was to stand; otherwise, the verdict was to be set aside, and a new trial ordered.

E. M. Wood, for the defendant.

M. Wilcox, for the plaintiff.

KNOWLTON, J. The exceptions were waived at the argument, and we have to consider only the questions presented by the report. The ruling of the Superior Court was made on the defendant's offer of proof in the opening of his counsel to the jury, and the argument in behalf of the plaintiff assumes that the agreement referred to in the offer was upon a sufficient consideration, and was enforceable as an independent contract. The contention chiefly relied on by the plaintiff is, that such an agreement is not available in defence to a suit on the note, al-

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though if broken it would furnish a good foundation for an action for damages. We do not assent to this proposition. An agreement to "look to the mortgaged property alone for the payment of the note" would be, in effect, an agreement to discharge the defendant from all liability upon it, which, if made upon a valuable consideration, would be a good defence to a suit for payment of it; although a new and independent contract, it would be unreasonable to permit a plaintiff who had made such an agreement to collect his note of the maker, and to compel the maker to seek his remedy by a suit to recover back from the payee as damages the sum which was paid. The tendency of the modern cases is to allow such an agreement to be shown in defence, to avoid circuity of action. *Howard* v. *Ames*, 3 Met. 308, 311. *Hood* v. *Adams*, 124 Mass. 481, 485. *Wadsworth* v. *Glynn*, 131 Mass. 220. *Hodgkins* v. *Moulton*, 100 Mass. 309, was decided on a question of pleading; and in *Waterhouse* v. *Kendall*, 11 Cush. 128, and *Traver* v. *Stevens*, 11 Cush. 167, the question related to the consideration of the note, and differed materially from that in the case at bar.

The offer, as stated in the report, does not very clearly show whether the agreement referred to was founded on a sufficient consideration; but the allegations of the answer are full in this particular, and the defendant's counsel asserted in argument, and the plaintiff's counsel did not deny, that the offer was in fact to show an agreement which would constitute a contract. If there was an agreement purporting to be made in reference to the defendant's sale of the equity of redemption in the mortgaged property in the form of an offer that the defendant might, if he chose, refrain from paying the note, and from taking measures to secure payment of it out of the proceeds of the mortgaged property, and that the plaintiff would look to the property alone for the payment of it, and the defendant, relying upon the offer, did refrain from making any effort to have the property applied to the payment of the note when it became due, and thereby suffered detriment, there would be a sufficient consideration for the agreement. It would be an ordinary case of a unilateral contract growing out of an offer of one party to do something if the other will do or refrain from doing something else. If the party to whom such an offer is made acts upon it in

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the manner contemplated, either to the advantage of the offerer or to his own disadvantage, such action makes the contract complete, and notice of the acceptance of the offer before the action is unnecessary. *Lent* v. *Padelford*, 10 Mass. 230. *Train* v. *Gold*, 5 Pick. 380. *Brogden* v. *Metropolitan Railway*, 2 App. Cas. 666, 691. *Weaver* v. *Wood*, 9 Penn. St. 220. *Patton* v. *Hassinger*, 69 Penn. St. 311.

In view of all the circumstances, we think the report should be interpreted as presenting the question whether the agreement offered to be proved, if made for a good consideration, would be a bar to the present suit. The entry should be,

Verdict set aside.

COMMONWEALTH *vs.* JOHN PURCELL.

Berkshire. September 8, 1891. — September 15, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Intoxicating Liquors — Common Nuisance — "Place."

A hotel is a "place" within the meaning of the Pub. Sts. c. 101, § 6, providing that "all buildings, places, or tenements . . . used for the illegal keeping or sale of intoxicating liquor, shall be deemed common nuisances."

COMPLAINT, alleging that the defendant from July 1, 1890, to August 18, 1890, at Cheshire, "did keep and maintain a certain place, to wit, a hotel there situate, then and there . . . used for the illegal sale and for the illegal keeping of intoxicating liquors, said place, so used as aforesaid, being then and there . . . a common nuisance." Trial in the Superior Court, before *Barker*, J., who, after a verdict of guilty, allowed a bill of exceptions, which, so far as material to the point decided, appear in the opinion.

E. M. Wood, for the defendant.

A. E. Pillsbury, Attorney General, & *C. N. Harris*, Second Assistant Attorney General, for the Commonwealth.

ALLEN, J. By the Pub. Sts. c. 101, § 6, "all buildings, places, or tenements . . . used for the illegal keeping or sale of intox-

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icating liquor, shall be deemed common nuisances." The complaint against the defendant charged that during a specified time he kept and maintained "a certain place, to wit, a hotel," used for that purpose. The objection taken on the part of the defendant is that a hotel or other building cannot be considered as a "place" within the meaning of the statute; that therefore the complaint in this particular is repugnant to itself, and that proof of keeping the hotel for the illegal purpose will not support the averment of keeping a place. There is certainly a technical argument of some force in support of this objection; but we think it would be too strict a construction of the statute to hold that a "place" must necessarily be exclusive of a building.

In common speech, a hotel is a place; and the enumeration of buildings, places, and tenements does not necessarily have the effect to require that a building shall not be described as a place. No doubt the word "place" may include what could not properly be described as a building or tenement, but it does not follow that it may not include both. We find nothing in the previous decisions upon this statute which requires the strict construction contended for. *Exceptions overruled.*

PERRY G. COMSTOCK *vs.* JOHN P. SON.

Berkshire. September 8, 1891. — September 15, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Warranty Deed — Consideration — Equitable Defence — Mistake — Damages.

A deed is not void as between the parties if without consideration, nor is want of consideration an answer to an action upon a covenant.

A conveyance of land is upon a good consideration, if made in satisfaction of a claim pressed by the grantee in good faith on the grantor, upon the grantor's promise to pay a note made by the grantee at the grantor's request and used by him, where the main defence to the claim, if not the only one, was a discharge in bankruptcy, the effect of which was in dispute.

A warranty deed of land will not be declared void on the ground of mistake, at the instance of the grantor, who fails to convey a good title by reason of having previously mortgaged the same land to the grantee, where the only mistake on the grantee's part was one into which he was led by the grantor's statement,

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in supposing that the grantor had not conveyed the land previously by the mortgage.

The grantee in a deed containing a covenant of warranty is entitled to substantial damages upon proof of an eviction and breach of the covenant.

CONTRACT, for breach of the covenant of warranty in a deed of land. Trial in the Superior Court, without a jury, before *Braley*, J., who found for the plaintiff; and the defendant alleged exceptions, which, so far as material to the points decided, appear in the opinion.

W. C. Spaulding, for the defendant.

H. C. Joyner, for the plaintiff.

HOLMES, J. This is an action on the covenant of warranty in a conveyance of land by the defendant to the plaintiff. The execution of the deed is admitted, and the evidence tended to show an eviction of the plaintiff by paramount title. The case comes before us on exceptions to the refusal of the court to give certain rulings. We will take up successively those which were argued.

1. The first ruling asked was that the deed was without consideration and void. A deed is not void as between the parties if without consideration, nor is want of consideration an answer to an action upon a covenant. *Mather* v. *Corliss*, 103 Mass. 568, 571. Furthermore, there was evidence that the plaintiff furnished a consideration. He was making a claim on the defendant, seemingly in good faith, upon the defendant's promise to pay a note for one thousand dollars, made by the plaintiff at the defendant's request, and used by the latter. The main, if not the only defence, was a discharge in bankruptcy, the effect of which seems to have been disputed. The conveyance was made in satisfaction of the plaintiff's claim. *Allis* v. *Billings*, 2 Cush. 19, 26.

2. The next request to be considered was that the evidence "sustained an equitable defence," under the St. of 1883, c. 223, § 14. We understand this to mean, that the evidence required, and not merely that it warranted, a finding for the defendant on this ground. The argument seems to be that the present deed conveyed no title and was void, because the defendant previously had conveyed the premises by a mortgage, and that the plaintiff had notice of the facts because he was the mortgagee. But a

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deed is not void simply because it fails to convey a good title. Still less are the covenants so, which are framed to meet that very contingency. It was said, that there was mutual mistake. But the plaintiff, and probably the defendant, understood what land was conveyed by the present deed. They used the language and did the thing which they meant to do. The only mistake on the plaintiff's part was one into which he was led by the defendant's statement, and consisted in supposing that the defendant had not conveyed the premises previously by the mortgage. The mistake was of the class which go only to motives, and probably more would have to be shown to authorize a rescission even in favor of the plaintiff. When there has been a breach of the covenant of warranty there generally has been a mistake of this sort as to the title of the grantor, but it hardly is a ground on which the grantor can expect to be relieved of his covenant.

3. The last point argued is that the plaintiff can recover only nominal damages. As we have said, the evidence showed an eviction and breach of the covenant of warranty. If these facts were proved, there is no reason why substantial damages should not be recovered. *Estabrook* v. *Smith*, 6 Gray, 572. *Mather* v. *Corliss*, 103 Mass. 568. *Exceptions overruled.*

NATHANIEL F. BENSON *vs.* CHARLES A. GRAY.

Bristol. November 1, 1890. — September 18, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Railroad — Contract of Transportation — Unloading Live Stock — Usage.

A railroad company, under its contract to transport and deliver certain horses and to store them if not called for, which stipulates that it will not be liable as a common carrier after their arrival at the "place of destination and unlading," that "live animals will only be taken at the owner's risk" during "transportation, loading, and unloading, unless specially agreed to the contrary," and that freight "must be taken away within twenty-four hours after being unladen from the cars," is bound to unload the horses, though at the owner's risk, irrespective of a local usage or general regulation of the company requiring consignees to unload live stock.

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REPLEVIN of two horses. The case was submitted to the Superior Court, and, after "judgment for the defendant and order of return," to this court, on appeal, on agreed facts, in substance as follows.

The plaintiff was the owner of the horses in question; and they were taken by one Tisdale, his agent, to the freight station of the Old Colony Railroad Company in Boston, and were loaded by him in a car for shipment to the plaintiff, at New Bedford. The railroad company received them for that purpose, and gave a receipt for the horses to Tisdale. This receipt, which was signed on behalf of the railroad company, and was headed "Live Stock Receipt," was dated October 23, 1889, and under the subhead "Marks and Numbers" bore the plaintiff's name and address, "N. F. Benson, New Bedford, Mass.," and contained the following: "Received from W. Tisdale, in apparent good order, two (2) horses. Number and mark as above, which the company promises to forward by its railroad, and deliver to or order, at its depot in , he or they first paying freight for the same, at the rate customary per ton of 2,000 pounds. N. B. If merchandise be not called for on its arrival, it will be stored at the risk and expense of the owner. . . . The following rules and regulations have been adopted by the several railroad corporations in regard to freight. . . . The company will not hold themselves liable at all for any injury to any articles of freight, during the course of transportation, arising from the weather or accidental delays. . . . Nor will they [the company] hold themselves liable as common carriers for such articles, after their arrival at their place of destination and unlading in the company's warehouses or depots. Machinery, furniture, stoves and castings, mineral acids, all liquids put up in glass or earthenware, unpacked fruit, and live animals, will only be taken at the owner's risk of fracture or injury during the course of transportation, loading, and unloading, unless specially agreed to the contrary. . . . All articles of freight arriving at their place of destination must be taken away within twenty-four hours after being unladen from the cars, — the company reserving the right of charging storage on the same, or placing the same in store at the risk and expense of the owner, if they see fit, after the lapse of that time."

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On October 24, 1889, the plaintiff went to the freight station of the railroad company in New Bedford, and paid the company's agent its freight charges on the horses, and received from the agent a receipt containing rules and regulations similar to those above set forth. The plaintiff then asked the agent to unload the horses for him from the car in which they were transported, but the agent declined to do so, and told the plaintiff that the company would not unload the same. The plaintiff thereupon refused to unload the horses, and demanded that the company should, under its contract and receipt, unload them, and upon the agent's refusal to do so came away. One of the rules and regulations of the railroad company was that live stock should be loaded and unloaded by the shipper and consignee, which rule and regulation was not otherwise known to the plaintiff at the time of shipping the horses and demanding the same of the company, except that he knew that the company's agent at New Bedford had been accustomed to require consignees to unload their horses from the cars. After the horses had been confined in the car for twenty-four hours, the defendant, at the request of the company's agent, unloaded them from the car, and took proper care of them while in his possession. After the plaintiff heard that the horses were in the defendant's possession at his stable, he notified him that he owned the horses, and to deliver them up forthwith. The defendant declined to deliver the horses, claiming to act under the instructions of the railroad company, until his charges for unloading and keeping the same were paid. The plaintiff refused to pay such charges, and demanded the horses, and, upon the defendant's refusal to deliver them, replevied the same.

The case was argued at the bar in November, 1890, and afterwards was submitted on the briefs to all the judges.

L. Le B. Holmes, for the plaintiff.

W. H. Cobb, for the defendant.

ALLEN, J. The transportation of the plaintiff's horses was under an express contract. This contract was prepared by the railroad company, and called "Live Stock Receipt." In it the company acknowledged the receipt of the two horses marked for the plaintiff at New Bedford, Mass., "which the company promises to forward by its railroad, and deliver to or order, at its

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depot in , he or they first paying freight for the same. . . . N. B. If merchandise be not called for on its arrival, it will be stored at the risk and expense of the owner." Then followed the rates for transporting different kinds of animals; after which were certain rules and regulations in regard to freight. Among these rules were the following: "Nor will they [the company] hold themselves liable as common carriers for such articles after their arrival at their place of destination and unlading in the company's warehouses or depots. Machinery . . . and live animals will only be taken at the owner's risk of fracture or injury during the course of transportation, loading, and unloading, unless specially agreed to the contrary. . . . All articles of freight arriving at their place of destination must be taken away within twenty-four hours after being unladen from the cars." The plaintiff paid for the transportation of the horses on their arrival at New Bedford, and took a receipt, which contained the same rules and regulations copied above, and applied for his horses; and the agent of the railroad company refused to unload the horses, and required the plaintiff to unload them.

In the opinion of a majority of the court, the railroad company must be held under this contract to have undertaken to unload the horses, though at the owner's risk. This contract was made out with express reference to the carriage of live animals. The railroad company promised to deliver them, and this implies unloading them. The company would also store them, unless called for, and this also implies unloading them. There are three several stipulations as to unloading goods, one of which in express terms includes live animals, and each of which implies that the company will unload them. It must, therefore, be held that the company undertook to unload them.

This being so, a usage of the company's agent at New Bedford to require the owner or consignee to unload live animals is of no consequence. The usage cannot override the contract. *Dickinson* v. *Gay*, 7 Allen, 29. *Seccomb* v. *Provincial Ins. Co.* 10 Allen, 305, 310. *Dodd* v. *Farlow*, 11 Allen, 426, 429. *Boardman* v. *Spooner*, 13 Allen, 353, 359. *Odiorne* v. *New England Ins. Co.* 101 Mass. 551. *Snelling* v. *Hall*, 107 Mass. 134. *Haskins* v. *Warren*, 115 Mass. 514, 535, 536. *Hedden* v. *Roberts*, 134 Mass. 38. *Emery* v. *Boston Marine Ins. Co.* 138 Mass. 398. *Collender* v. *Dinsmore*,

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55 N. Y. 200. A rule and regulation of the company can have no greater effect. The company's rule requiring consignees to unload live stock was not otherwise known to the plaintiff than this; he knew that the company's agent at New Bedford had been accustomed to require consignees to unload their horses. But if well known, it must still give way to the contract. It was a matter of contract between the plaintiff and the railroad company that the company should unload the plaintiff's horses. This being so, neither a usage nor a rule to the contrary will avail to excuse the company from the performance of its undertaking. In this respect, the case differs from *Miller* v. *Mansfield*, 112 Mass. 260, and other cases, where there was no such contract. *Judgment for the plaintiff.*

ONSET STREET RAILWAY COMPANY *vs.* COUNTY COMMISSIONERS OF PLYMOUTH & another.

Suffolk. November 11, 1890. — September 19, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Street Railway — Land Damages — Certiorari — County Commissioners — Joinder of Petitioners — Separate Warrants of Distress.

The use and operation for passenger and freight purposes by the Onset Street Railway Company, under the agreement made by it with the Onset Bay Grove Association, of the railroad already built by that association along an avenue at its seaside resort, rendered such street railway company liable under its charter (St. 1886, c. 285,) to settle, in the manner provided by the Pub. Sts. c. 112, all damages caused to the abutting lot owners by the use of the avenue for the building of such railroad.

Under the Pub. Sts. c. 49, § 34, which authorizes two or more persons applying to the county commissioners at the same time for damages or indemnity to join in the same petition, lot owners injured by a street railway constructed in front of their lots may join in one petition.

Where several lot owners join in one petition for damages to their separate estates, county commissioners may issue separate warrants of distress for the damages awarded to such owners.

If a street railway company, whose charter requires it to settle all damages caused by the taking of streets at a seaside resort for the building of its road, constructs the same, and transports both freight and passengers thereon, the abutting lot owners who are seised in fee of easements in such streets, and who are injured by their obstruction or change of grade, are entitled to damages, although not owning to the centre of the streets.

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PETITION for a writ of certiorari. The case was heard by *Devens*, J., and reserved by him for the consideration of the full court. The facts appear in the opinion.

The case was submitted on briefs, in November, 1890, and afterwards, in June following, was submitted on the same briefs to all the judges except *Field*, C. J. and *Lathrop*, J.

A. Hemenway & W. Scofield, for the petitioner.

H. Kingman, for the respondents.

BARKER, J. This is a petition for a writ of certiorari, heard by a single justice, and reserved for the determination of the full court. The petitioner, a street railway company, complains that warrants of distress have been issued by the county commissioners of Plymouth County, for land damages awarded to owners of lots which abut on streets through which its railway is constructed.

The persons claiming damages acquired the titles of their respective lots from the Onset Bay Grove Association. This was a corporation chartered by the St. of 1877, c. 98, "for the purpose," as stated in § 1, "of holding personal property and real estate, where a wharf, hotel and other public buildings may be erected, and building lots sold or leased for the erection of private residences or cottages, under such rules and regulations as the association may prescribe," and subject to the general laws applicable to such corporations. It bought the territory in Wareham known as Onset and Riverside, and caused maps of the same to be recorded in the Plymouth Registry of Deeds, on which were shown lots, streets, avenues, etc. Each lot was numbered on the plans, and was conveyed by a separate deed, in which the only description was, "Lot numbered on a plan of lands of Onset Bay Grove Association, recorded . . . as the same is set out on same plan."

After the owners had thus acquired title, the association built a railroad in the avenue on which their lots were situated, and operated it by steam power, changing to some extent the grade of the avenue. This was done without legislative authority. No location of the railroad was filed, but it was built and in use by the association before June 16, 1886, the date of the petitioner's charter. By this charter (St. 1886, c. 285) the petitioner was empowered, in § 4, "to construct, maintain and use a railway with convenient double or single tracks upon and over such

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streets and highways in the town of Wareham as shall be from time to time fixed and determined by the selectmen of said town; and upon and over the ways and territory of the Onset Bay Grove Association, a corporation duly established in said town, by consent of said association; provided, all damages incurred by the owners of the fee in any of said last mentioned ways and territory by the taking of any part of said ways or territory for the building of said road shall be settled by said company as is provided in chapter one hundred and twelve of the Public Statutes." The charter also gave specific authority, in § 9, to "purchase or lease the tracks already laid upon the lands of the Onset Bay Grove Association upon such terms as may be mutually agreed upon," and authorized the transportation of freight as well as of passengers upon the railroad, and its operation by animal power, the Baldwin steam motor, or any other motive power which the selectmen of Wareham may permit.

Pursuant to this authority, the petitioner, on December 31, 1886, entered into an indenture with the Onset Bay Grove Association, which conveyed to the petitioner a right of way over the lands and streets of the association in Onset and Riverside, shown on the plans mentioned, "according to the routes and measurements of the track of said railway company, as they are now actually located and constructed." The petitioner covenants to save the association harmless from all damages lawfully recovered from or suffered by it by reason of the location or use of the tracks in any place within the territory. The indenture states that nothing in it shall be construed to impair or conflict with the rights of any purchaser of land abutting on the line of the railway, the conveyance of which had been already made or agreed upon. Since its execution, the petitioner has used the railroad in accordance with the terms of the indenture and of its charter. The railroad so used is the same which had been built and used by the association. The petitioner has done nothing to affect the property of the landowners, save to accept the indenture and use the railroad under the indenture and its charter.

On July 11, 1887, the claimants to whom damages were awarded joined with others in a petition to the county commissioners, alleging ownership in fee of lots shown upon the plan,

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and that the railway company had constructed its railroad over the avenues on which the lots were situated, and asking damages. The railway company objected to the jurisdiction of the commissioners, and claimed that the owners were improperly joined in one petition, and that there was no sufficient allegation of their ownership, or of any taking of their property. At the hearing the commissioners held, as matter of law, that the deeds conveyed to the grantees a title as owner in fee to the middle of the avenue, found that some of the claimants were entitled to damages, and that others were not, and on May 8, 1888, awarded separate damages, with costs, to nine of the owners. No jury was applied for, and, the damages not having been paid, the commissioners, on August 6, 1889, issued separate warrants of distress. The petitioner's property was seized on these warrants on August 10, 1889, and thereupon this proceeding was brought.

The answer of the commissioners shows that the only evidence of a "taking" by the railway company was the indenture of December 31, 1886, and the actual use of the tracks therein mentioned, which were laid by the association before the passage of the railway company's charter.

The claim which lies at the foundation of the petitioner's case may be first considered. It is in substance that the commissioners had no jurisdiction of any claims of the landowners for damages, because it had not taken any of their land, but had only purchased or leased, by the indenture of December 31, 1886, the tracks already laid by the association.

This claim is unsound. All that was made necessary by its charter to render the railway company liable to settle, in the way provided by the Pub. Sts. c. 112, damages incurred by an owner in fee of any of the territory by the taking of any of the ways for the building of the railroad, was for the company to use the railroad. This is the plain intention of §§ 4 and 9 of its charter, when construed in the light of the existing facts. The situation was this. The Onset Bay Grove Association had, without legislative authority, built, and was operating, a steam railroad in Wareham. The railroad was laid in streets in which the owners of abutting lands had easements in fee, even if the association owned the soil, and these easements were obstructed and inter-

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fered with by the railroad. Whether or not it was a public nuisance, its use was liable to be stopped by the individuals whose property it injured. The charter of the petitioner, and its use in accordance with the charter of the railroad under the indenture of December 31, 1886, had the effect of legalizing the maintenance of the railroad and its operation in a reasonable manner, and must have been so intended. The charter and the acts of both corporations are to be construed in the light of this situation. The railway company was explicitly authorized to purchase or lease the tracks already laid, and the expressed condition of its use of them was that it should settle, as provided in the statute, all damages incurred by landowners by the taking of any part of the ways for the building of the railroad.

The charter neither calls for nor contemplates any formal or documentary "taking" or seizure of property by the railway company in order to make it liable to settle the damages contemplated in the proviso of § 4. It does require it to settle them in a particular manner, as a condition of its right to maintain or use the road already laid. The petitioner used the railroad mentioned in this condition, and thereby gave the respondents jurisdiction to award to any owner of the fee in any part of the territory any legal damages incurred by him by the taking or use of the ways for the building of the railroad. The phrase "ways and territory of the Onset Bay Grove Association," in § 4 of the charter, is clearly intended to indicate the territory known as Onset and Riverside and the ways there laid, and not to designate real estate or property of the association. The landowners who asked the respondents to assess their damages were "owners of the fee" for whose benefit the proviso was enacted. If, in point of fact, they had incurred legal damages by the using of the streets for the building of the railroad, the commissioners had jurisdiction to estimate and award them.

The joinder in one petition to the county commissioners of different persons owning separate lots is authorized by the provision of the Pub. Sts. c. 49, § 34, that, "if two or more persons apply to the commissioners at the same time for joint or several damages or indemnity, they may join in the same petition." The commissioners, therefore, had jurisdiction of the parties and of their dispute under a proper petition, and whether the

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claimants were entitled to damages depended upon the question of fact to be tried, whether they had suffered legal damages.

This court will not, upon a petition for certiorari, attempt to revise the findings of commissioners upon such a question of fact. *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206. The writ is not granted as matter of right, but is in the discretion of the court, which must be satisfied that substantial justice requires it. It will not be issued to correct merely technical errors, especially such as could have been otherwise remedied, nor unless the petitioner has pursued his remedy without laches. If incompetent evidence has been admitted, or an erroneous ruling made, and the petitioner's rights are not really prejudiced, and the court can see that the decision was substantially correct and worked no injustice, it will not interfere by granting the writ. *Cobb* v. *Lucas*, 15 Pick. 1. *Gleason* v. *Sloper*, 24 Pick. 181. *Whately* v. *County Commissioners*, 1 Met. 336. *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206.

In view of these principles, the issuing of separate warrants of distress, if irregular, would not authorize the granting of the writ. It does not touch the merits of the controversy, and, as the costs were divided, worked no injury to the petitioner. But we are of opinion that the issuing of separate warrants of distress was within the power of the commissioners. Their proceedings in such cases are governed, in the absence of prescribed rules, by common sense. In cases of the joinder in one petition of several persons claiming damages to separate estates, separate warrants may be necessary to prevent a failure of the remedy. It is analogous to the granting of separate judgments in cases tried together before a sheriff's jury; *Lanesborough* v. *County Commissioners*, 22 Pick. 278, 281; *Wyman* v. *Lexington & West Cambridge Railroad*, 13 Met. 316; *Warner* v. *Franklin*, 131 Mass. 348; and to the issuing of several executions upon one judgment in cases of suits upon a probate or other bond.

It remains to inquire whether any substantial injustice appears to have been caused by the rulings of the commissioners in determining the question of damages. While it is settled that the construction of an ordinary street railway over a public way is not an additional servitude, for which owners are entitled to

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compensation without special provision therefor, (*Attorney General* v. *Metropolitan Railroad*, 125 Mass. 515, and *Pierce* v. *Drew*, 136 Mass. 75,) the petitioner's charter contains, as we have seen, a special provision that it shall settle all damages caused by the taking of the streets for the building of this railroad. Aside from this, we are of the opinion that it cannot be said, as matter of law, that the building and use of a railroad operated by steam power in transporting both freight and passengers in close proximity to dwellings, in a village designed and used as a seaside summer resort, and in a street in which the owners of the abutting lots have rights of way and other easements in fee which may be obstructed by the railroad, is not an injury to such owners. Whoever owned the soil of the avenue in which the railroad was built, the abutting landowners were seised in fee of an easement in the avenue, under which they were entitled to its free and unobstructed use in connection with their estates. This easement was appurtenant to their lots, and its interruption or impairment was a damage to their lands. *Dodge* v. *County Commissioners*, 3 Met. 380. *Parker* v. *Boston & Maine Railroad*, 3 Cush. 107. *Rodgers* v. *Parker*, 9 Gray, 445. *Walker* v. *Old Colony & Newport Railway*, 103 Mass. 10. *Story* v. *New York Elevated Railroad*, 90 N. Y. 122.

But it is claimed by the petitioner that the ruling that the deeds conveyed a title in fee to the middle of the avenue was erroneous, and the respondents do not now argue that it was correct. We do not find it necessary to consider whether this ruling was correct. It is clear that, whoever may own the soil of the avenue, no one is entitled to its exclusive occupation. The respondents could not have made their estimate and award upon the basis that the lot owners were entitled to compensation for the value of the land covered by the tracks. Upon every theory, it was part of an avenue for travel, and subject to easements which would prevent any use inconsistent with its being an open and common street. Whether, therefore, what the commissioners call the fee was thought by them to have been in one party or the other, can have made no substantial difference in their estimation of the damages, which, upon the theory that the avenue must be kept open and unobstructed for common use as a street, must have been determined in view of the injury to the lots by reason

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of the obstruction of the way and its change of grade. This view is strengthened by the facts that none of the awards are large, that no damages were awarded to some of the claimants, and that the awards do not vary in amount in proportion to the size of the lots. We see nothing to indicate that this ruling, which was but one of several elements entering into the award, has resulted in any substantial injustice to the petitioner.

Petition dismissed.

SAMUEL H. DEBBINS *vs.* OLD COLONY RAILROAD COMPANY.

Suffolk. January 16, 19, 1891. — September 21, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Railroad — Grade Crossing — Contributory Negligence.

In an action against a railroad company for personal injuries occasioned to the plaintiff by being run down by a locomotive engine, there was evidence that the plaintiff, intending to take an outward train, approached a station located near a level crossing of a street and the tracks; that a platform extended to the street from a waiting shed opposite the station, and the space between was planked; that he came along the street and found his train at the station on the farther track stretching partly over the crossing; that the crossing gate and the platform gates on his side of the cars were both closed; that he passed the crossing gate, which did not obstruct the sidewalk, and glanced up the inward track, but saw nothing because of steam and smoke from the engine of his train; that he proceeded to cross the inward track diagonally so as to go around the rear of his train and get upon it, and while crossing was struck by an inward train and injured; and that at the time the gateman was standing in the middle of the street with his back to the plaintiff, and the bell upon the engine of the inward train was not rung or its whistle sounded. *Held*, that the plaintiff was not entitled to go to the jury.

TORT, for personal injuries occasioned to the plaintiff by being run down by the defendant's locomotive engine at the crossing at grade of its railroad and Spring Street in Boston. Trial in the Superior Court, before *Mason*, J., who ruled that upon the evidence the action could not be maintained, and ordered a verdict for the defendant; and the plaintiff alleged exceptions. The nature of the evidence appears in the opinion.

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The case was argued at the bar in January, 1891, and afterwards was submitted on the briefs to all the judges.

J. E. Cotter & C. F. Jenney, for the plaintiff.

J. H. Benton, Jr., for the defendant.

HOLMES, J. This is an action for personal injuries. After the evidence was all in, the judge before whom the case was tried directed a verdict for the defendant; and the question is whether the direction was right. The plaintiff's evidence tended to prove the following facts. On October 22, 1888, the plaintiff came to the defendant's Spring Street Station in Boston, intending to take the twenty minutes past five afternoon train for Dedham. He approached the station by Spring Street, moving toward the northeast. When he reached it, he found his train already there on the farther track, and the gate across the street on his side closed. The station was a little to his right on the farther side of the track, with a waiting shed opposite, on the plaintiff's side, the platform of which extended to Spring Street. There was planking between the station and the shed, enabling passengers to cross the tracks on a level. The train extended across this planking, back partly across the Spring Street crossing, and the platform gates on the side of the cars nearest to the plaintiff were closed. The plaintiff passed the gate on the sidewalk, which was not obstructed by it, and began to cross the nearer track diagonally on the line of Spring Street, intending to go round the rear of the train and to get upon it. While crossing, he was struck by another train coming in from Dedham. According to his own testimony, before crossing he glanced up the track toward Dedham, but saw nothing, there being much steam and smoke from the engine of his train hanging over the track between the station and the shed. The engine which struck him had no head-light, and it was getting toward dusk; but the plaintiff's evidence would not warrant the conclusion that the approaching train could not have been seen if the smoke had not concealed it. There was evidence that the train which ran the plaintiff down was not ringing its bell or sounding its whistle. The gateman was standing in the middle of the highway, with his back to the plaintiff; but we see nothing favorable to the plaintiff in this fact.

As there is considerable difference of opinion among the

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members of the court, we shall not discuss this case further than to say that, in the opinion of a majority, if the provisions of the Pub. Sts. c. 112, § 213, apply, — which we do not decide, — the plaintiff was guilty of gross or wilful negligence within the exemption of that section. If he had been merely a traveller on the highway and had undertaken to cross the track while the gate was closed, knowing it to be so, he would have taken the risk of the consequences. We express no opinion as to the defendant's contention that he would have been a wrongdoer. But the case would not have been distinguishable from *Granger* v. *Boston & Albany Railroad*, 146 Mass. 276.

However, we assume in favor of the plaintiff that he had a right to enter the station and to get upon the nearer platform in order to take a train, notwithstanding the fact that the gate was closed, and that if, when within the gate, he attempted to cross the track, he did not do so absolutely at his own risk. But he did so having the warning which but for the special exigency would throw the risk upon him. The only way in which he could get rid of taking the risk was by using all the precautions which the circumstances would permit, and which would occur to a prudent man. One of these was to stop and look if the smoke over the nearest track was so dense that he could not see whether there was an engine approaching. *Fletcher* v. *Fitchburg Railroad*, 149 Mass. 127, 134. He was warned that that track as well as the other might be specially dangerous at that moment. He was not acting under any excitement which might have excused a misjudgment, as in *Copley* v. *New Haven & Northampton Co.* 136 Mass. 6. He elected to go forward on the strength of a glance, when the train was so close upon him as to run him down before he could cross the track.

The distinction between negligence and gross or wilful negligence is a distinction of degree, and therefore of course the latter cannot be defined once for all. But the same thing is true of the distinction between negligence and intent, in ordinary cases. Yet the distinction exists, and may make the difference between manslaughter and murder. *White* v. *Duggan*, 140 Mass. 18, 20. *Commonwealth* v. *Pierce*, 138 Mass. 165, 178. It seems to us that the negligence of the plaintiff in the present case was of the higher degree. In *Wheelock* v. *Boston & Albany*

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Railroad, 105 Mass. 203, the train which ran the plaintiff down was running at unusual speed, and there was thought to be some evidence of an invitation to him to cross the track as he did. But here the defendant hardly can be said to have invited the plaintiff to cross the track, seeing that its only act was to shut the gate in his face. *Exceptions overruled.*

COMMONWEALTH *vs.* MARGARET LYNN.
SAME *vs.* SAME.

Hampshire. September 15, 1891. — September 22, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Intoxicating Liquors — Complaint and Warrant — Formal Defects — District Court — Special Justice.

Objections to a complaint and warrant for formal defects apparent on the face thereof are waived by a failure to make them at the time of the defendant's arraignment in a district court, and a motion to dismiss filed in the Superior Court on appeal comes too late.

If a complaint is addressed to a "special justice" of a district court, and that title also is appended to his signature to the jurat, and he issues a warrant thereon, it is to be presumed that the complaint was properly received by him and the warrant properly issued, that he was acting within his jurisdiction under the Pub. Sts. c. 154, § 22, and that the court was not in session.

TWO COMPLAINTS, for unlawfully exposing and keeping for sale intoxicating liquors with intent unlawfully to sell the same. The complaint in each case was addressed "To A. J. Fargo, a Special Justice of the District Court of Hampshire," and the jurat thereon was signed "A. J. Fargo, Special Justice." The warrant issued upon each complaint was also signed "A. J. Fargo, Special Justice." Neither the complaint nor the warrant bore a seal of the court.

In the Superior Court, before the jury were impanelled, the defendant filed the following motion to dismiss the complaint: "1. Because said complaint and warrant are not in due form of law. 2. Because there is no seal of the District Court of Hampshire attached to the complaint or warrant in said case.

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3. Because it does not appear that A. J. Fargo, Esq. had any right or authority to receive said complaint or issue said warrant. 4. Because said complaint and warrant are not sufficiently signed, sealed, and executed according to law. 5. Because no offence known to the laws of the land is plainly and formally, fully, and substantially alleged, charged, or set forth in said complaint and warrant."

At the hearing before *Thompson*, J., upon this motion, it appeared that A. J. Fargo was a special justice of the District Court of Hampshire, and that this court had both a clerk and a seal. The judge overruled the motion, and the defendant excepted.

The defendant was then tried, and the jury returned a verdict of guilty; and the defendant alleged exceptions.

J. B. O'Donnell, for the defendant.

A. E. Pillsbury, Attorney General, & *C. N. Harris*, Second Assistant Attorney General, for the Commonwealth.

KNOWLTON, J. If the defendant's objections to the warrant could have availed her if made at the time of the arraignment in the district court, which we do not intimate, they were waived by her failure to make them there, and her motion to dismiss, filed in the Superior Court, came too late. *Commonwealth* v. *Wolcott*, 110 Mass. 67. *Commonwealth* v. *Hart*, 123 Mass. 416. *Commonwealth* v. *Wait*, 131 Mass. 417. Pub. Sts. c. 214, § 25.

The complaint appears to have been properly received by the special justice, and it was proper for him to issue the warrant. "A justice or special justice may receive complaints and issue warrants, when the court is not in session." Pub. Sts. c. 154, § 22. It is to be presumed that the magistrate acted within the authority given him by the statute, and that the court was not in session. *Hyde* v. *Malley*, 121 Mass. 388. *Commonwealth* v. *Brusie*, 145 Mass. 117.

His official character is sufficiently shown by the complaint, which describes him as "Special Justice of the District Court of Hampshire," and by the words "Special Justice" appended to his signature to the jurat. *Commonwealth* v. *Maguire*, 11 Gray, 459. All the questions raised by the defendant are covered by previous adjudications of this court.

Exceptions overruled.

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HENRY MOONEY *vs.* CONNECTICUT RIVER LUMBER COMPANY.

Hampshire. September 15, 1891. — September 22, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Negligence — Due Care.

In an action for personal injuries there was evidence that the plaintiff was employed in the defendant's saw-mill upon a sawing machine; that, while in the performance of his duty in a place which ought to have been safe, the carriage of the machine, which had been left at rest with the steam shut off and with the lever used in starting and stopping it locked, started itself, and injured him; that both the defendant's foreman and the plaintiff knew that three days before the machine had also started in the same manner when no one was near it, but the foreman had told the plaintiff that it had been repaired, and it had worked perfectly up to the time of the accident. It was undisputed that a machine which would so start was improperly constructed or adjusted, and was unsafe. *Held*, that the jury were warranted in finding that the defendant was negligent as to the machine's original construction and adjustment, or in not discovering its dangerous condition and making it safe before the accident; and that whether the plaintiff was in the exercise of due care was also a question for the jury.

In an action for personal injuries alleged to have been caused by the defendant's negligence, the plaintiff is bound to introduce evidence from which the jury may properly infer that the accident was caused by such negligence, but is not required to point out the particular act or omission which caused the accident.

TORT, for personal injuries occasioned to the plaintiff, while employed by the defendant in its steam saw-mill.

At the trial in the Superior Court, before *Thompson*, J., there was evidence that the plaintiff was about thirty-two years of age, and was employed by the defendant as a sawyer in one of its mills; that he tended one of the sawing machines in the mill, which consisted in part of a carriage which ran up and down a track, and it was a part of his duty to change saws when a saw in use became dull; that on Saturday, April 5, 1890, the steam was shut off and the mill stopped, and the plaintiff locked the lever used to start and stop the machine; that presently the foreman came along and ordered the plaintiff to change the saw in his machine; that the plaintiff stepped into the track and tried to pull the saw off, but it pinched a little,

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and the plaintiff then got a monkey wrench with which to loosen the parts holding the saw; that for this purpose he got down on his knees before the carriage, and just as he had adjusted the wrench to a nut he heard a noise and the carriage started; that before he could get out of the way the carriage struck him, knocked him over upon his back, and severely injured him; that the carriage ran up the track some distance and stopped, when another workman "grabbed hold of the lever and began to push on it as hard as he could, and could not move it at all, so he took the lock off, and the carriage came off" the plaintiff; that on the Tuesday preceding the accident the mill was shut down at noon, and the plaintiff locked the lever upon the machine and went to dinner; that on his return, and before he unlocked the lever, and while the foreman, one Joe Grindell, was standing near, the machine started up and "run away," and broke some parts of the machine; that both the foreman and the plaintiff reached the machine "pretty near at the same time, and the lock was on"; that the plaintiff said to the foreman, "Here, Joe, this machine will kill somebody yet," and again, "Mr. Grindell, you fix this machine or get somebody else to run it"; that the foreman then said that he would see that the machine was repaired; that the machinery in the mill was shut down all of Tuesday afternoon, and the next morning when the plaintiff came to the mill he asked the foreman if the machine had been repaired, and the foreman replied that it had, and that it was all right; that from that time up to the day of the accident the machine did not again run away; and that on one occasion before the Tuesday preceding the accident the same machine had run away, but did no damage.

There was also expert evidence, which was uncontradicted, that a sawing machine that would start up of itself, whether the lever by which it was started was locked or not, without assistance from any one or any one's touching the lever, was not a properly constructed machine, or was improperly adjusted, and was unsafe.

The defendant requested the judge to rule: "(1) that on all the evidence the plaintiff is not entitled to recover; (2) that there is no evidence for the jury of want of ordinary care on part of defendant; (3) that there is no evidence for the jury of

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the exercise of due care on part of plaintiff; (4) if the evidence in the case fails to furnish satisfactory grounds for an inference, or for anything better than a mere conjecture as to the cause of the starting of the car, plaintiff cannot recover; (5) if it does not appear from the evidence what was the real cause of the starting of the machine, plaintiff cannot recover."

The judge declined so to rule, and submitted the case to the jury, upon instructions to which no exception was taken.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. G. Bassett, for the defendant.

G. D. Robinson, for the plaintiff.

KNOWLTON, J. There was evidence that the carriage of the sawing machine started up, and injured the plaintiff, when it was left at rest with the steam shut off, and the lever locked which was used to start and stop it. It was proved, and not disputed, that a machine which would do that was improperly constructed, or improperly adjusted, and was unsafe. There was evidence that the defendant's foreman knew, several days before the accident, that the machine had "run away," or started up when no one was near it. The jury were warranted in finding that the defendant was negligent in not seeing that it was properly constructed and adjusted, so as to be safe when it was originally put in position, or in not discovering its dangerous condition and making it safe before the accident. *Moynihan* v. *Hills Co.* 146 Mass. 586. *Myers* v. *Hudson Iron Co.* 150 Mass. 125.

It was a question for the jury whether the plaintiff was in the exercise of due care. He was in the performance of his duty in a place which ought to have been safe. Although he knew that the machine had "run away," it had worked perfectly for three days immediately before the accident, and there was evidence that the foreman had told him that it had been repaired.

The defendant's last two requests for rulings were rightly refused. The plaintiff was bound to introduce evidence from which the jury might properly infer that the accident was caused by the defendant's negligence, but was not required to point out the particular act or omission which caused the accident. *Griffin* v. *Boston & Albany Railroad*, 148 Mass. 143.

Exceptions overruled.

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JOSIAH PARSONS & others *vs.* CITY OF NORTHAMPTON.

Hampshire. September 15, 1891. — September 22, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

County Commissioners — Crossing of Way by Railroad — Separation of Grade — Sharing of Expense by City — Petition in Equity by Tax-payers.

A city will not be enjoined, upon the petition of ten tax-payers under the Pub. Sts. c. 27, § 129, from paying its share of the expense of abolishing a level crossing therein of a street and railroad, upon due proceedings had under the operation of which important rights have accrued, because the opinion of the mayor and aldermen as to the necessity thereof, transmitted to the county commissioners as required by the Pub. Sts. c. 112, § 129, was not expressed by formal vote or evidenced by record; such an objection, if sound, should be taken before the county commissioners at the beginning of the proceedings, and if taken for the first time upon such a petition comes too late.

The Pub. Sts. c. 27, § 129, authorizing petitions in equity by ten tax-payers of a city or town to prevent the illegal expenditure of money, are not intended to afford means of testing, by proceedings purely collateral, questions affecting the validity of the findings or decrees of other tribunals.

Tax-payers in a city, who have no particular interest in a schoolhouse lot therein taken in separating the grade, at a crossing of a street and a railroad, cannot maintain a petition under the Pub. Sts. c. 27, § 129, to prevent the payment by the city of its share of the expense of such separation, upon the ground of a want of authority in the county commissioners, even if the commissioners could not lawfully take any part of the lot for the purpose of abolishing the crossing.

A petition by ten tax-payers, under the Pub. Sts. c. 27, § 129, to prevent a city from paying its share of the expense of separating the grades of a railroad and a street at a crossing, which is filed immediately after a vote by the city council to raise the money, but more than a year after the order of county commissioners prescribing the work and an award fixing the city's share of the expense were made, cannot be maintained where the crossing is located near the centre of the city, and the railroad company has already incurred large expense in prosecuting the work.

PETITION IN EQUITY, under the Pub. Sts. c. 27, § 129, by ten taxable inhabitants of the city of Northampton, to restrain the city from paying any part of the expense of abolishing the crossing at grade of South Street in that city by the New York, New Haven, and Hartford Railroad. The case was heard by *Knowlton*, J., who reserved it for the consideration of the full court. The facts appear in the opinion.

C. G. Delano, for the petitioners.

R. W. Irwin, for the city of Northampton.

J. C. Hammond, for the railroad company.

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BARKER, J. This petition of ten tax-payers, brought under the provisions of the Pub. Sts. c. 27, § 129, asks us to enjoin the city of Northampton from defraying any part of the expenses of the separation of the grades of the railroad and the street at the South Street crossing. The alterations which at the time of the filing of the petition were in process of construction, under a decree of the Superior Court, have been adjudged necessary, and ordered by the county commissioners, on proceedings under the provisions of the Pub. Sts. c. 112, § 129, of which they assumed and exercised jurisdiction upon an expression of opinion and petition purporting to be made by the mayor and aldermen. It is now contended that the payment of any part of the expenses of these alterations by the city would be an abuse of its powers, because public school property has been taken by the proceedings, and because the county commissioners assumed and exercised jurisdiction in consequence of the opinion of the mayor and aldermen that an alteration of the crossing was necessary, while in fact that board had never in regular session passed a vote or taken any action with reference to the subject, and there is no record of such action.

The power of the commissioners was considered by this court in the case of *Davis* v. *County Commissioners*, 153 Mass. 218, a petition for certiorari brought by citizens and tax-payers who owned lands upon that portion of South Street discontinued by the alterations. The objections there urged were overruled. But these petitioners aver that they were none of them parties or privies in estate or intent to the decree of the commissioners, and were not entitled to bring a petition for a writ of certiorari to quash the same, and also that on December 29, 1890, the mayor and aldermen have instituted, under the St. of 1890, c. 428, other proceedings for the separation of the grades of South Street and the railroad at the same crossing. The petition for certiorari was filed on May 21, 1890, and dismissed on February 25, 1891. The award of the special commission was confirmed by the Superior Court on June 4, 1890. The St. of 1890, c. 428, which placed upon the State a proportion of the expense of the separation of grades in cases thereafter commenced, took effect on June 21, 1890. The work of constructing the alterations at the crossing was commenced about March 15,

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1891, and was prosecuted continuously and in good faith by the railroad company. The present petition was not filed until June 20, 1891, at which time $15,000 had been expended.

The report of the single justice finds that the location of the bridge over the railroad and its approaches is a reasonable and suitable one, and that the school lot is not materially injured for school purposes, and that its market value is but little diminished. The city has never objected to the taking of the school lot, nor made any claim for damages, while the only heir of the grantor of that portion of the lot taken has released all right in it, and does not object to the taking. The rapid growth of the city and the great increase of traffic upon the railroad are matters of common knowledge. The protection of the lives and property of the general public from the dangers incident to level crossings has long been recognized as an imperative necessity; and the purpose of the Legislature to do away with such crossings so far as possible is, as was said in *Davis* v. *County Commissioners*, *ubi supra*, obvious.

The facts required to give the county commissioners jurisdiction are, by the Pub. Sts. c. 112, § 129, that there shall be a crossing, and that either the mayor and aldermen of the city or the selectmen of the town in which the crossing is, or the directors of the railroad corporation, shall be "of the opinion that it is necessary for the security or convenience of the public that an alteration should be made." Neither the mayor and aldermen, selectmen, nor directors make an adjudication of the necessity, which is to be determined by the commissioners; and the statute prescribes no mode in which the opinion of the mayor and aldermen, selectmen, or directors shall be arrived at or communicated. In the present instance, the mayor and aldermen signed and presented to the commissioners a written petition, stating the existence of the crossing, and that they were of the opinion that an alteration was necessary for the security and convenience of the public, and asking the commissioners to adjudicate upon the necessity, and to prescribe the manner and limits within which the alteration should be made. No objection to the sufficiency of this expression of opinion was raised before the county commissioners, or in the Superior Court. The difference between such an expression and a vote passed in a regular session and certi-

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fied and recorded, when the opinion held and expressed is not in itself an adjudication, but is merely the foundation for proceedings by some other tribunal, is not one which tends in any way to affect the decision to be arrived at, or to prejudice the rights of any party to the question to be tried. The objection that the opinion was not expressed by vote, and is not evidenced by record, even if sound, — a point upon which we express no opinion, — ought to have been taken before the county commissioners and at the beginning of the proceedings. It is not of such a nature as to require us to decide in a collateral proceeding that the payment of money by the city in accordance with a decree of the Superior Court founded upon the adjudication of the commissioners, and under the operation of which important rights have accrued, is illegal, and ought to be enjoined.

The taking of a portion of a schoolhouse lot for one of the approaches, even if void for want of authority in the commissioners, would not make their whole decree illegal, or the expenditure of money for carrying their order into effect void, so far as it was authorized by law. The petitioners have no title to the lot, and with respect to it are not the conservators of the rights either of the city or of the heirs of the original grantor. Having no particular interest in it, they have no equity to maintain this petition upon the ground of a want of authority, even if the commissioners could not lawfully take any part of the lot for the purposes of the crossing.

The statute provisions authorizing such petitions as the present were not intended to afford the means of testing, by proceedings purely collateral, questions affecting the validity of the findings or decrees of other tribunals. As was said by Morton, C. J., in *Prince* v. *Boston*, 148 Mass. 285, 288: "It has never been held that the statute gives an absolute right to any ten tax-payers to maintain a bill in equity, whenever a city or town has voted to pay money from its treasury for a purpose which is not legal. It gives the court jurisdiction to hear and determine the matter in equity, and it has been held that the court will not grant relief where the plaintiffs have been guilty of laches by delaying to bring their suit until the rights of other persons have been affected by the action of the town."

These principles would make it inequitable to grant the prayer

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of the present petition. The vote instructing the finance committee to raise money was passed on June 15, 1891, and this petition made immediately thereafter. But the proceedings under which the expenditure was incurred had been long pending, were public in their nature, and of general interest. The order of the county commissioners prescribing the work was made on April 1, 1890, and the award apportioning a part of the expense to be paid by the city was confirmed in the Superior Court on June 4, 1890; it was then apparent that the city would be called upon to make payment of its share of the expense. The location of the crossing was near the centre of the city, and the fact that the railroad company commenced work upon the alterations in March, 1891, and had since been incurring large expense in its prosecution, must be presumed to have been within the knowledge of the petitioners and of their fellow citizens generally. After all parties to the proceedings before the county commissioners and in the Superior Court, including the city whose interests the statute authorizing such petitions as the present was intended to protect, have permitted all this to occur without interposing the objections now urged, it would be most inequitable to allow the petitioners to obtain from this court a declaration which, by incidentally holding void the proceedings of other tribunals, would delay indefinitely the completion of a work of which all parties acknowledge the necessity, and which would lead to great confusion as to the rights of all concerned.

Petition dismissed.

HENRY HANDFORTH *vs.* WALTER P. MAYNARD & another.

Franklin. September 16, 1891. — September 22, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Ice Crop — Malicious Destruction — Damages.

The measure of damages for maliciously destroying an ice crop by drawing off a pond is the value of the plaintiff's right to harvest the ice upon the pond, and so make it his property at the time when the ice was destroyed.

Upon the assessment of damages for maliciously destroying the ice in a pond by drawing off the water, evidence is admissible on the issue of value, in the ab-

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sence of a market for the ice, to show its condition, the amount fit for harvesting and the time required to harvest it, the highest and lowest temperature about the time, the cost of cutting, drawing, packing, and covering the ice, its value when placed in the icehouse, and the risks attending the harvesting.

In an action for maliciously destroying the ice in a pond by drawing off the water, where there was evidence as to the weather and the many risks as to harvesting the ice, the judge refused to instruct the jury that the plaintiff could not recover profit beyond the expense which might inure to him from the ice if harvested, or any amount beyond the actual expense to which he had been subjected, but instructed them that the true measure of damages would be the cash value of the ice harvested and deposited upon the shore of the pond, less the expense of harvesting it; and that "to determine that value it would be necessary for them to find upon the evidence the quantity of the ice, the expense of harvesting and depositing it on the shore, the value of the ice so deposited, and then deduct the expense from the aggregate value of the ice on the shore, and the difference would be the amount of damages the plaintiff could recover." *Held*, that this instruction might be construed to mean that the jury were to take into account the risks which might prevent the plaintiff from securing all of the ice; and that the defendant had no ground of exception.

TORT. The declaration alleged that Selina Hawks was the owner of a parcel of land in Greenfield, through which flowed Cherry Rum Brook; that by means of a dam built across the brook below her land a pond of fresh water of the area of about eight acres was formed upon her land, "creating thereon a valuable privilege for cutting and harvesting ice"; that on January 1, 1889, she sold to the plaintiff this privilege for the term of one year; and that the defendants, intending to deprive the plaintiff of the profit of harvesting the ice, opened a gate in the dam and drew off the water, whereby the ice thereon, which the plaintiff was engaged in harvesting, settled into the mud at the bottom of the pond and was destroyed, to the great damage of the plaintiff. The answer contained a general denial, and set up that the defendant's acts were done under the direction of one Warner and one Sanderson, who had a legal right to draw the water from the pond in question.

Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, which, so far as material to the points decided, was as follows. It appeared in evidence that the ice in question was formed upon a pond, a part of the waters of which covered land of which Hawks owned the fee; that on January 1, 1889, she sold to the plaintiff the privilege of cutting and storing what ice might form thereon for the term of one year from that date; that the defendants were ice-dealers, and

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acted as agents of Warner and Sanderson, who owned the dam by which the pond was created; and that the water was caused to be drawn off regardless of the plaintiff's rights, and for the purpose of destroying the ice. The case was tried as if the action were against Warner and Sanderson. The plaintiff was allowed to introduce in evidence, against the defendants' objection, the condition of the ice at the time the water was drawn off, the amount of ice in condition to harvest, how long it would take to harvest it, the minimum and maximum temperature at about that time, the fair price per ton for harvesting the ice, and the worth of the ice if harvested and placed in the ice-house. One of the plaintiff's witnesses testified, on cross-examination, that many risks attended the harvesting of ice.

The judge instructed the jury that the rule of damages might be stated generally, that, where one party has wrongfully injured, entirely destroyed, or impaired the value of another's property, he must make it good to the party injured; that he must restore to the injured party his property, or the value of that which he has destroyed or impaired; that the true measure of damages in this case, if they found for the plaintiff, would be the market or cash value of the ice harvested and deposited upon the shore of the pond, less the expense of so harvesting and depositing it; and that to determine that value it would be necessary for them to find upon the evidence the quantity of the ice, the expense of harvesting and depositing it on the shore, the value of the ice so deposited, and then deduct the expense from the aggregate value of the ice on the shore, and the difference would be the amount of damages the plaintiff could recover. No objection or exception was taken to this statement of the rule of damages, if the plaintiff was entitled to recover the value of the ice.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

W. S. B. Hopkins, for the defendants.

J. A. Aiken, for the plaintiff.

BARKER, J. At the hearing, all exceptions were waived except those relating to the rule of damages and the admission of evidence under that rule. The instructions requested were that the plaintiff could not recover the value of the ice harvested and

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stacked under cover, or recover profit beyond the expense which might inure to him from the ice if harvested, or any amount beyond the actual expense to which he had been subjected.

The instructions given did not allow the jury to give as damages the value of the ice harvested. It would plainly have been incorrect to instruct them that the plaintiff's recovery was restricted to the expense of harvesting, or to the actual expenses which he had incurred.

The true measure of his damages was the value of his right to harvest the ice upon the pond, and so make it his property at the time when the ice was destroyed and the plaintiff's right made worthless by the defendants' acts. In the absence of a market for ice so situated, evidence was admissible, as tending to show its value and the value of the plaintiff's right, as to the condition of the ice, the amount fit for harvesting, how long it would take to harvest it, the minimum and maximum temperature at about that time, the cost of cutting, drawing, packing, and covering the ice, the worth of ice when placed in the ice-house, and the risks attending the process of harvesting. The exceptions to the admission of evidence bearing upon these points must therefore be overruled.

The remaining exception is that to the measure of damages given by the presiding justice, and to the rules laid down to guide the jury in its application. The instruction was, that the true measure of damages "would be the market or cash value of the ice harvested and deposited upon the shore of the pond, less the expense of so harvesting and depositing it; that to determine that value it would be necessary for them to find upon the evidence the quantity of the ice, the expense of harvesting and depositing it on the shore, the value of the ice so deposited, and then deduct the expense from the aggregate value of the ice on the shore, and the difference would be the amount of damages the plaintiff could recover." The bill of exceptions states further, "No objection or exception was taken to this statement of the rule of damages, if the plaintiff was entitled to recover the value of the ice."

It is to be observed that the instruction does not contain in terms any statement of one element which is essential to the correct assessment of the plaintiff's damages, in that it omits

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explicitly to require the jury to consider the risks attending the process of securing the ice. If it is to be so construed as to have permitted the jury to assess the damages without reference to those risks, they may have allowed damages for all of the ice destroyed by the defendants, although it could not have all been secured and stored. If the instruction meant that the true measure of damages would be the market or cash value of so much of the ice as the jury should find would have been harvested and stored but for the defendants' wrongful acts, less the expense of harvesting and depositing it, the ruling would do the defendants no injustice. We have had great difficulty in deciding whether this was the sense in which the ruling was understood by the jury. There was evidence as to the weather and the many risks of harvesting ice. The value of the ice deposited on the shore, and not the value of all the ice, was laid down as the first element of the computation to be made, and the expense was to be deducted from that value.

These considerations, in connection with the additional statement above quoted, tend to the conclusion that the instruction was understood to require the jury to consider, in making their assessment, the risks which might prevent the plaintiff from securing all of the ice.

In the state of the pleadings, even if the plaintiff could not maintain either an action of trover or of trespass *quare clausum*, and if the ice was not his, its value and the expense of securing it both enter into the basis of the assessment of his damages for the wrong done by the defendants, and for which he was entitled to recover under the pleadings and the evidence. *Richards* v. *Gauffret*, 145 Mass. 486. The defendants contended, at the trial, that the value of the ice was entirely immaterial upon the question of damages. While the plaintiff was not, strictly speaking, entitled to recover the value of the ice, the measure of damages contended for by the defendants was so absolutely different from that given in the instructions to the jury, that we are inclined to the opinion that the presiding justice may have fairly understood the defendants to have waived any exception, if the value of the ice was properly the basis of the assessment.

Exceptions overruled.

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WILLIAM W. WARD *vs.* NEW ENGLAND FIBRE COMPANY.

Franklin. November 16, 1890. — September 22, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Master and Servant.

On the issue whether the plaintiff was the defendant corporation's servant, and a fellow servant of its employees, by whose negligence he was injured, there was evidence that he was working by the month for a firm engaged in putting a machine into the defendant's mill; that the defendant's agent had prepared the specifications for the machine and "sent the order" to the firm "to do the job," but gave no further directions to the firm in regard to the work; and that, when nearly completed in the firm's shop, the machine was carried to the mill to be set up, the supporting woodwork being prepared by the defendant's employees on the same day. A member of the firm testified, "There was no contract as to making" the machine; "we were to charge them for stock and time." *Held*, that there was evidence upon which the jury might properly find that the plaintiff was not a servant of the defendant.

TORT, for personal injuries occasioned to the plaintiff in the defendant's mill, from the alleged negligence of its employees. Trial in the Superior Court, before *Sherman*, J., who refused to rule that, upon the evidence, the plaintiff could not recover, and, after a verdict for the plaintiff, allowed exceptions, which, so far as material to the point decided, appear in the opinion.

J. A. Aiken, for the defendant.

W. G. Bassett, for the plaintiff.

KNOWLTON, J. The only question in this case is whether, upon the undisputed facts, the plaintiff was a servant of the defendant, and a fellow servant of the employees of the defendant, by whose negligence he was injured. He was working by the month for Manchester and Ward, who were engaged in putting a hopper into the defendant's pulp mill. The specifications for the hopper were made by one Strahan, the defendant's superintendent, and the materials were furnished by Manchester and Ward, and the work was done by their employees. They were to charge for the materials and the time of their men. At the time of the accident, the plaintiff was in the defendant's mill, at work upon the hopper. The defendant corporation contends

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that, although he was in the general service of Manchester and Ward and received his pay from them, he consented that they should set him to do the defendant's work, to be paid for by the defendant according to the time spent upon it, and to be done according to specifications prepared by the defendant's superintendent, and to be managed and directed by the defendant during its progress. If this were so, he would be the defendant's servant in the particular business, notwithstanding that in a general sense he was a servant of Manchester and Ward. *Wood* v. *Cobb*, 13 Allen, 58. *Kimball* v. *Cushman*, 103 Mass. 194. *Johnson* v. *Boston*, 118 Mass. 114. *Harkins* v. *Standard Sugar Refinery*, 122 Mass. 400. On the other hand, if the defendant arranged with Manchester and Ward that they should make and set up a hopper in the defendant's mill according to certain specifications, and should charge a reasonable price for the materials furnished and the time spent in doing it, Manchester and Ward, after having entered into the arrangement, would have a right to go on and complete the hopper, and to be paid for it, and to furnish and control the men engaged upon it, and to direct their work. In that case, the title to the materials used in constructing the hopper would not pass to the defendant until the hopper was completed, and put in place; and the men who did the work would be the servants of the contractors.

On the exceptions, we cannot say, as matter of law, what the nature of the arrangement was. The plaintiff testified as follows: "Word came by a man sent from the defendant's mill to do the job. Strahan sent the order. The hopper was made according to the specifications and plan which was sent." Myron P. Ward, one of the firm of Manchester and Ward, said, "There was no contract as to making hopper; we were to charge them for stock and time." There was testimony that the hopper was nearly completed at the shop of Manchester and Ward, and then carried over to the defendant's mill; and the evidence tended to show that the defendant's agents, after preparing the specifications and employing Manchester and Ward, gave no directions in regard to the work, although the woodwork, which we suppose to be for the support of the hopper, was put up by two of the defendant's employees on the day when the hopper was set up.

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The specifications for the work and the plans of the mill which were put in evidence are not before us, and we have not a very clear understanding of the construction and use of the hopper. But from the statement that word came "to do the job," and that "Strahan sent the order," we think it probable that the parties expected Manchester and Ward to assume responsibility for the proper construction of the hopper according to the specifications, and to manage and control the work, and to be paid for it, not a specified price, but a fair compensation for the labor and materials required to perform their contract. The testimony that "there was no contract as to making hopper," is immediately followed by the words, "we were to charge them for stock and time," and may well mean merely that the price to be paid was not agreed, and not that there was no undertaking to fill the order. The plaintiff and Myron P. Ward both testified that at the time of the accident the plaintiff was working for Manchester and Ward. This may have been intended to mean, either merely that he was in their general service, or that he was then doing their work, and subject to their control as to the manner of doing it.

There was evidence on which the jury might find that Manchester and Ward contracted to construct the hopper, and to receive for it a price to be ascertained when it was done, and that they alone had a right to direct and control the plaintiff while he was engaged in the work. If so, it would follow that he was not the servant of the defendant, and that the defendant's requests for rulings were rightly refused.

Exceptions overruled.

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COMMONWEALTH *vs.* JOHN RYAN & another.

Hampshire. September 15, 1891. — September 23, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Robbery — Joint Indictment — Instructions to Jury.

On an indictment for robbery against H. and R., it appeared that, as they were riding with the person robbed, H. seized the reins, stopped the wagon, and, jumping out, said, "We are two to one, so give us what you 've got," meaning whiskey in such person's possession and being so understood; and that at the same time H. told R., who was riding behind, to hold the horse, which he did, and H. took the whiskey, and both drank from the bottle. H. was defaulted. The presiding judge refused a ruling requested by R., that he could not be convicted unless it was found that he participated by some act or word at the time in the assault or menace by which the person robbed was induced to give up his property, and instructed the jury that, if both defendants were engaged in a joint enterprise to rob such person, it was not necessary for both to do the acts of violence or of putting him in fear; it was enough if one did them, and the other was ready to assist and was aiding and abetting the one who did them in what he did; but that if R. "did not participate in the purpose of H., and had no purpose to rob, and did not join in the purpose, if he was not there to aid and abet, and if his seizing of the horse was not for that purpose, he is not to be found guilty." *Held*, that R. had no ground of exception.

INDICTMENT for robbery, against John Ryan and Cornelius Holloran. At the trial in the Superior Court, before *Bishop*, J., the defendant Holloran was defaulted; and Ryan, after a verdict of guilty, alleged exceptions, the substance of which appears in the opinion.

T. G. Spaulding, for Ryan.

A. E. Pillsbury, Attorney General, & *C. N. Harris*, Second Assistant Attorney General, for the Commonwealth.

HOLMES, J. This is an indictment for robbery. According to the evidence for the prosecution, one Stockwell was driving a buckboard upon a country road, and carrying the two defendants, — Holloran by his side, Ryan at the hind end of the buckboard, — when Holloran snatched the reins, stopped the wagon, jumped out and stood in the road in front of him, and said, "We are two to one, so give us what you 've got," meaning, and being understood to mean, a bottle of whiskey in Stockwell's possession. At the same time Holloran told Ryan to take the

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horse by the head, and Ryan got off the buckboard and did so. Holloran took the whiskey, and he and Ryan drank from the bottle. The defendants were found guilty, and the case is before us on exceptions, the only ones argued being to the refusal of a ruling requested on behalf of Ryan, and to the instructions given in place of it.

The ruling asked was as follows: "If the jury find that Stockwell was put in fear by assault or menace, and was thereby induced to give up his property, Ryan cannot be convicted of the offence alleged, unless the jury also find that he participated in such assault or menace, by some act or word at the time." The instructions given were as follows: "If the defendants were engaged in a joint enterprise of going through Stockwell, it is not necessary that both of them should have done the acts of violence or the acts of putting in fear, if one of them did these acts and the other was present and ready to assist the one who did them, and was aiding and abetting the one who did them in what he did. But if Ryan did not participate in the purpose of Holloran, and had no purpose to rob, and did not join in the purpose, if he was not there to aid and abet, and if his seizing of the horse was not for that purpose, he is not to be found guilty."

The defendant's argument proceeds on the assumption that there is no evidence that Ryan was a party to putting Stockwell in fear until after the whiskey was taken from him. But the fact is otherwise. Holloran's declaration, in Ryan's presence, "We are two to one," imported a statement and threat to Stockwell that Ryan was there as an accomplice of the speaker, and was ready to help him in carrying out his designs. Ryan did not repudiate the statement, and did help in fact a moment afterwards. Even if his act of holding the horse was later than Holloran's taking the whiskey, the jury would have been warranted in finding that he made himself a party by not repudiating Holloran's threat on his behalf, if he had not done so before by a previous arrangement.

The objection urged to the instructions is that by implication they allowed the jury to find Ryan guilty if he seized the horse for the purpose of aiding and abetting Holloran, although that was after the taking, and even if he had not joined in what was

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done before. We do not think this a fair interpretation of what was said. The words, "and if his seizing of the horse was not for that purpose," do not state a new and distinct condition for acquittal, so that, if his seizing was for that purpose, Ryan must be found guilty irrespective of anything else. They are to be read as part of a single hypothesis, a part of which was that Ryan was not there to aid and abet. If the prisoner feared that the language might mislead the jury, he should have called attention to it. But we see no likelihood that it did so.

Exceptions overruled.

INHABITANTS OF EASTHAMPTON *vs.* COUNTY COMMISSIONERS OF HAMPSHIRE.

Hampshire. September 15, 1891. — September 23, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Town Way — County Commissioners — Eminent Domain — Taking Property devoted to Public Use.

County commissioners may take a strip of land from a schoolhouse lot for a needed town way, where the use of the lot for school purposes, though considerably impaired, will not be wholly prevented.

PETITION for a writ of certiorari to quash the proceedings of the county commissioners of Hampshire in laying out a town way, upon the refusal of the road commissioners of Easthampton so to do. *Knowlton*, J. reserved the case for the consideration of the full court. The case appears in the opinion.

D. Hill, for the petitioner.

W. G. Bassett, for the respondent.

HOLMES, J. The short question before us is whether county commissioners can take a strip of land from a schoolhouse lot for a town way. Taking the strip will injure the lot considerably for school purposes, but will not prevent its use, so far as appears. We must assume that the way is necessary, and, if it be material, we must assume that taking this strip is reasonably

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necessary for the way, whoever may be the final judge on the latter question when it is raised.

The case thus presented lies in the doubtful region between two extremes which are free from doubt. Ordinarily, a highway or railroad could not be laid out longitudinally over a previously established railroad or highway by virtue of general statutory powers, or without special authority from the Legislature. *West Boston Bridge* v. *County Commissioners*, 10 Pick. 270, 272. *Springfield* v. *Connecticut River Railroad*, 4 Cush. 63, 71. *Boston & Maine Railroad* v. *Lowell & Lawrence Railroad*, 124 Mass. 368, 371. On the other hand, in the absence of special regulations and by virtue of a general authority to lay out such roads, necessary crossings could be made. When we come to more difficult cases, we derive little aid from the varying statements of general principles under which authority will be implied to take land for a second public use. *Wellington, petitioner*, 16 Pick. 87, 105. *Boston & Maine Railroad* v. *Lowell & Lawrence Railroad*, 124 Mass. 368, 370. *Providence & Worcester Railroad* v. *Norwich & Worcester Railroad*, 138 Mass. 277, 279. *Boston & Albany Railroad* v. *Boston*, 140 Mass. 87, 89.

We must consider the relative importance and the necessities of the two uses generically, the extent of the harm to be done, accept any light that history may throw, and make up our minds under all the circumstances of the particular case as best we can. To put cases nearer to the present, and lying between the two extremes which we have mentioned, it would be a strong thing to say that, without special circumstances, county commissioners or other like officers, acting under general powers, could lay out a highway through a public reservoir so as to ruin it. See *State* v. *Montclair Railway*, 6 Vroom, 328; and as further examples on this side, *In re Boston & Albany Railroad*, 53 N. Y. 574; *Prospect Park & Coney Island Railroad* v. *Williamson*, 91 N. Y. 552. On the other hand, if a tract of land were held for public purposes, which was so broad that it was impracticable to go round it, and which could be crossed without serious harm by the edge of a stream that flowed through it, it well might be held lawful for the way to cross it. See *Wood* v. *Macon & Brunswick Railroad*, 68 Ga. 539. The proviso of our act of 1834, c. 187, § 1, the original of the Pub. Sts. c. 82, §§ 29, 30, implies very clearly that

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any "railroad or other public easement already located" through a graveyard was located lawfully. The law seems to be different in Connecticut. *Evergreen Cemetery Association* v. *New Haven*, 43 Conn. 234. When it is considered that very large tracts of land often are appropriated to school purposes, (see St. 1782, Oct. 3, 1 Mass. Spec. Laws, 33, 34; St. 1784, March 23, 1 Mass. Spec. Laws, 72; St. 1791, March 11, 1 Mass. Spec. Laws, 303; St. 1792, Nov. 17, 1 Mass. Spec. Laws, 399; and St. 1801, March 3, 2 Mass. Spec. Laws, 425,) it is impossible to accept an unqualified rule that no part of such land can be taken for a way under any circumstances without an express enactment. In the only case which we have found precisely parallel to this, it was held that the strip was lawfully taken from the school lot. *Rominger* v. *Simmons*, 88 Ind. 453. See also *Indiana Central Railway* v. *State*, 3 Ind. 421, 425.

The converse case of an attempt to place a schoolhouse within the limits of a highway is by no means so strong. Apart from any comparison of the two public uses, usually there can be no necessity for the selection of such a place, since there is a much greater freedom of choice as to where a schoolhouse shall be put than as to where roads shall run; but to show the views which have prevailed in Massachusetts, we quote the following from Records of the Governor and Council, Vol. VII. page 291, in 1 Prov. Laws, (State ed.) 363: "November 9th, 1702. The motion presented in writing by Nathl. Byfield and Ebenezer Brenton, Esqrs., for a resolution of this question: viz. whether the setting up a court house or school house, in the street of any town within this Province, where the street is so wide as to leave not less than twenty-five foot clear for passage on each side of sd. edifice, be not allowable within the true meaning and intent of the act entitled 'An act to prevent encroachments upon highways, streets, &c.,' and of the proviso in the said act? was returned from the Representatives; with the concurrence of that House to the Resolve past thereon by the Board on the 4th currt., to wit: Resolved, that the above building, being of public use, and within the reason of the proviso in the said act, and that the erecting of the same shall be accounted by this court no breach of the said act. Which resolve is consented to. J. Dudley."

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The act in question was the Prov. St. of 1698, c. 2, 1 Prov. Laws, (State ed.) 311. Very plainly, schoolhouses were not saved by the proviso, but they were read in by the foregoing resolve. If the present case had been presented, we think the answer would have been more unhesitating still.

Petition dismissed.

SAMUEL ELMER *vs.* GEORGE R. FESSENDEN.

Franklin. September 15, 16, 1891. — September 23, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Slander — Contradiction of Witness — Damages.

In an action of slander in falsely telling the plaintiff's workmen that there was arsenic in silk furnished by him to them to work with, if the plaintiff calls the mother of one of them as a witness to the fact that a machine for working the silk was removed from her house after the words were spoken, in order to show that such workman was deterred from longer working for him by the defendant's statement, and she testifies that she cannot fix the time when the words were spoken, it is discretionary to admit evidence that at a former trial she testified that the words were spoken before the machine was removed.

Damages claimed by such plaintiff for the trouble to which he was necessarily put, in order to determine whether there was arsenic in the silk and to protect his employees, will not be reduced because a company in whose general employment he was, and to which he was accountable for the time so spent, had told him that no deduction would be made by reason of lost time from the salary which it had paid him.

TORT against a physician, for slander in falsely telling workmen of the plaintiff, who was a silk manufacturer, that there was arsenic in the silk furnished by him to them to work with, and thereby causing them to leave his employment. After the former decision, in 151 Mass. 359, the case was heard in the Superior Court before *Dewey*, J., who, after a verdict for the plaintiff, allowed a bill of exceptions, which, so far as material to the points decided, appear in the opinion.

J. A. Aiken, for the defendant.

H. Winn, for the plaintiff.

HOLMES, J. 1. This is an action for words spoken by the defendant, and falsely alleging that the silk furnished by the plaintiff to his workmen contained arsenic. 151 Mass. 359. At

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the second trial, the plaintiff, in order to show that one Phillips had been deterred from working for him longer by the defendant's statement, called Phillips's mother as a witness, to show that her machine for working the silk was removed from the house after the words were spoken. The witness testified that the defendant spoke the words, but that she could not fix the time. To contradict her, evidence was admitted that at the former trial she had testified that the words were spoken before the machine was removed. The defendant excepted.

We cannot say that the evidence did not tend to contradict the witness. The question is one of degree. If the former testimony had been given the day before, under circumstances of great solemnity, no one could doubt that it tended to contradict her denial of recollection a day later. On the other hand, as suggested by the counsel for the defendant, the fact that a person recited a date at school, hardly tends to contradict his statement in middle life that he does not remember it. Where the line shall be drawn must depend upon circumstances, and must be left largely to the discretion of the presiding judge.

Neither can we say that the contradiction was not material. It was open to the defendant to argue that, as the witness knew of the speaking of the words and of the removal of the machine, it was very improbable that she would not have remembered it if one was the cause of the other, and thus that her statement that she did not remember which was first was in effect evidence that the defendant's words were not the cause of the witness's daughter's stopping work. If so, it was proper to allow the witness's statement to be contradicted.

2. The plaintiff claimed, as part of his damages, trouble which he was put to necessarily, in order to determine whether there was arsenic in his silk; and to protect his employees. He estimated the amount at $5.24 per day, and the jury allowed him for eight days at that rate. No exception was taken to the ruling allowing a recovery for this item, but instructions were excepted to which allowed the plaintiff to recover irrespective of the state of things between himself and a company in whose general employ he was, and to which he was accountable for the time spent as stated. That company had told the plaintiff that they should make no deduction from his salary because of the

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lost time. This ruling was correct. The plaintiff does not recover because he was compelled to break his contract with the company, but for his own time and trouble, irrespective of his contracts. His cause of action for that could not be affected if a stranger saw fit to pay him for the same time, either by way of gift or upon consideration. *Exceptions overruled.*

JOHN B. O'DONNELL *vs.* EMMA E. HALL.

Hampshire. September 15, 1891. — September 26, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Fraudulent Conveyance — Acts and Declarations of Grantor — Agency.

Acts and declarations of a grantor in a deed, after delivery thereof, while putting the same on record at the grantee's request and clothed with no further authority, are not admissible to impeach the title which it purports to convey.

On a writ of entry to recover land, alleged to have been conveyed in fraud of a creditor by two owners in common to the tenant, the wife of one of them, through her father, there was evidence that the father bought and gave it to his daughter as a home, for which purpose she and her husband then occupied it, the other grantor having also lived with them some of the time; that on the first business day after receiving a letter from the creditor's attorney demanding payment, the grantors, the tenant, and her father met at her home and talked about making the conveyance; that on the same day they went to an attorney's office, where the deeds were executed; that the actual occupation of the premises remained unchanged; and that the tenant had no personal property, and knew all that was done in respect to the conveyance to her father. *Held*, that whether the transaction was fraudulent was for the jury.

WRIT OF ENTRY to recover possession of a farm in Southampton.

At the trial in the Superior Court, before *Barker*, J., the contention on the part of the demandant was that the farm was conveyed to the tenant in fraud of Gilbert M. Hall, who was a creditor of his sons, George W. Hall and her husband, Leander C. Hall. There was evidence that George and Leander became the owners of the farm in 1884, as tenants in common; that Leander and his wife occupied the farm as a home, George living with them some of the time; that on February 17, 1888,

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Gilbert made a demand through an attorney upon his sons for payment of his claim, by a letter which was received by them on Saturday, the 18th; that on Monday following one Stannard, the tenant's father, together with George, Leander, and the tenant, were at the farm, and talked about conveying the same; that on the same day they went from Southampton to Springfield, to an attorney's office, and there deeds were drawn up from George and Leander to Stannard, and from the last named to the tenant; that the deed from Stannard was then executed and handed to Leander, who was directed by Stannard to carry it to Northampton to the registry of deeds for record; that the deed from Stannard to the tenant was carried home by him for his wife to sign, and subsequently was delivered to the tenant and duly recorded; and that Leander on the next day went to the registry of deeds and handed the deed to a clerk, but requested the clerk not to record it at the time, and went away, but soon returned and directed it to be recorded. The demandant then offered to show that when Leander entered the registry of deeds he was flushed in the face, appeared very much excited, acted as if nervous and in a hurry, and asked where the record of attachments was kept; that the clerk directed him to the office of the clerk of the courts, and he hurriedly went out of the room towards that office; and that he soon returned smiling, and said, "It 's all right, you may record it." The judge, upon the tenant's objection, excluded the evidence thus offered; and the demandant excepted.

The judge also excluded, upon the tenant's objection, the following letter, written and signed by Leander, to the attorney of Gilbert: "Southampton, February 22, 1888. J. B. O'Donnell. Dear Sir, — Yours of the 17th at hand. I was not aware that there was any claim against us in that line. We will call and see you as soon as my brother is well enough to ride up there. Yours respectfully. L. C. Hall."

There was also evidence that Gilbert brought an action upon his claim against George and Leander on April 6, 1888, and made a special attachment of the premises in question; and that subsequently, upon his recovery of judgment against them for the sum of $922.04, the farm was duly sold on execution and conveyed to the demandant. There was also evidence, that at

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the time of the conveyance to the tenant she had no personal property, and that she had none at the time of the trial; and that money was paid by Stannard for the farm to George and Leander at the time of the conveyance.

The judge ruled that there was no evidence to sustain the claim of the demandant, and directed the jury to return a verdict for the tenant; and the demandant alleged exceptions.

J. B. O'Donnell, pro se.

H. W. Ely & C. F. Ely, for the tenant.

ALLEN, J. The demandant's exceptions to the exclusion of evidence must be overruled. The general rule is, that the acts and declarations of a grantor in a deed, after its delivery, are not admissible to impeach the title which it purports to convey. *Holbrook* v. *Holbrook*, 113 Mass. 74. *Lincoln* v. *Wilbur*, 125 Mass. 249. *Shores* v. *Hooper*, 153 Mass. 228. In the present case there was nothing to show that either Stannard or the tenant knew of the inquiries and statements made by Leander at the registry of deeds, or of his appearance and manner while there. The ground upon which the admissibility of evidence to show such inquiries, statements, appearance, and manner is urged is, that Leander was acting as agent of Stannard in leaving the deed for record. It did not appear, however, that he had any discretionary authority. Stannard directed him to carry it for record to the registry of deeds. There is nothing to show that there was any error in law in applying the general rule, and excluding the evidence offered by the demandant. It did not appear that Leander was agent of the grantee in any such sense as to authorize him to make admissions prejudicial to the title. For the same reason, the letter of Leander might also properly be excluded.

Upon the general question whether the conveyance by the two Halls to Stannard was made with a design to defraud the grantors' creditor, we are of opinion that the evidence should have been submitted to the jury. There was, to be sure, direct evidence tending to support the validity of the deed, and to show that Stannard bought the property merely for the purpose of making a gift of it to his daughter, and thus of enabling her to continue in her home. The circumstances, however, would furnish an argument to the jury that there was a purpose on the

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part of the grantors, in which the grantee participated, of defrauding the father of the grantors. The two grantors owned the premises as tenants in common, and Leander and his wife occupied them as a home, George living with them some of the time. The grantors were indebted to their father in a claim upon which he afterwards recovered judgment for $922.04. An attorney's letter demanding settlement of this claim was sent to them. On the first business day after its receipt, the grantors and Stannard, and also the tenant, who was Stannard's daughter and Leander's wife, were at the tenant's house, and talked about making the conveyance; and on the same day they went from Southampton to Springfield, to an attorney's office, where the deed to Stannard was drawn up and executed, and also a deed from him to his daughter. The actual occupation of the premises remained unchanged. The evidence tended to show that the tenant had no personal property, and also that she knew all that was done in respect to the conveyance to her father. We think the demandant had a right to have the effect of these and other circumstances passed upon by the jury, who would also weigh the explanations offered by the tenant. *Marden* v. *Babcock*, 2 Met. 99, 105. *Plimpton* v. *Goodell*, 143 Mass. 365.

Exceptions sustained.

RHODA N. LINTON *vs.* FRANK D. ALLEN.

Suffolk. November 18, 1890. — October 23, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Vendor and Purchaser — Bond for a Deed — Covenant of Warranty — Performance — Presumption — Agency — Evidence — Exceptions.

The submission to a jury of specific questions, as to whether there was a mutual rescission and abandonment of a contract by the parties, and whether the plaintiff was ready and willing to perform it and the defendant neglected upon request to do so, is correct, if both rescission and abandonment are in issue, and no reason is urged or appears why such submission was prejudicial to the defendant's interest.

A general covenant of warranty in a deed does not estop the grantor from claiming a breach of explicit conditions, incorporated in the granting part of the deed, restricting the future use of the granted property.

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If in an action to recover back money paid under a bond for a deed there is evidence of the giving of the bond and of part payment, and of a willingness and readiness on the plaintiff's part to pay the balance, of which however no actual tender is made, and to accept a deed, which is not tendered and cannot be given because the title is defective, and of an attempt by the plaintiff at rescission and settlement, the defendant's request to take the case from the jury is properly refused, although there was no absolute refusal by him to make the conveyance.

The obligor in a bond to convey land is not "ready to perform," in a legal sense, so long as he is not in a condition to convey a good title.

A request for a ruling that the fact that incumbrances existed upon property which the defendant had covenanted to convey did not of itself excuse the plaintiff from making a tender of amounts due on notes given by him for the purchase money, is properly denied, if sufficient and correct instructions are given upon the question whether a tender was necessary.

If a bill of exceptions, after stating that certain instructions were requested, but not given, fails to show either that no instructions were given on the subject matter thereof, or that correct instructions thereon were not given, but introduces its statement of the charge by reciting that "the judge charged the jury, among other things, as follows," it will be presumed that instructions not stated were given upon the matters to which the requests relate, and that they were correct.

In an action to recover back money paid upon a bond for a deed, requests for rulings based upon the theory that no demand or offer made on or to the husband of the obligor could be material are properly denied, if exceptions alleged by the defendant clearly warrant the inference that the contrary doctrine was correct, by disclosing that the husband acted as her agent in her lifetime, and was for a time her special administrator, and is the residuary legatee under her will.

In an action to recover back money paid upon a bond for a deed, in which it appears that the obligee, after making part payments and being ready and willing to accept a deed, sought to rescind because of a defect in the title, communications between the parties after the date of a letter from the obligee to the obligor, in which the former states her conclusion to give up the property, are admissible in evidence upon the issues of rescission, abandonment, and breach of covenant.

In an action to recover back money paid under a bond for a deed, the defence that the obligee cannot recover for repairs or taxes caused by her failure to perform her agreement is disposed of by a finding of the jury that there was no such failure.

The admission of parol evidence of the contents of a letter, of which a duplicate is already in evidence, affords no ground of exception.

An exception to the exclusion of a statement, on the ground that it should have been admitted as made in the presence of one of the parties, cannot be sustained, if the bill of exceptions does not state that such party was present, and no mention of such ground was made when the evidence was excluded, and the statement also relates to an immaterial matter.

At the trial of an action to recover back money paid upon a bond for a deed, where the defence is that the obligee who brings the action failed to perform, conversations between the plaintiff and the obligor's special administrator and residuary legatee, which take place upon his demanding payment of notes given by the obligee for a balance due, to the effect that she hesitated about paying

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without a good title but would like to pay if he would give her a good title, and, finally, that she would pay no more until she got a title, are admissible in evidence.

CONTRACT, against the administrator *de bonis non*, with the will annexed, of the estate of Chloe A. Berry, on a bond for a deed signed by the plaintiff and by the testatrix.

At the trial in the Superior Court, before *Staples*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which, so far as material to the points decided, appear in the opinion.

The case was submitted on briefs in November, 1890, and afterwards was submitted on the same briefs to all the judges except *Field*, C. J.

W. A. Gaston, for the defendant.

F. S. Hesseltine, for the plaintiff.

BARKER, J. This is an action of contract, to recover money paid by the plaintiff as part of the price of land in Cottage City, under a bond for a deed from Chloe A. Berry, and money expended upon the estate while the plaintiff was in occupation under the bond, and for taxes. The action was brought on June 22, 1886, and the bond is dated October 30, 1882. Chloe A. Berry died testate in August, 1883, never having had a child born alive by her husband, Zebina E. Berry, who, on April 21, 1884, was appointed special administrator of her estate. On September 25, 1884, Charles F. Allen was appointed executor of her will, and he dying, the defendant was appointed administrator *de bonis non* on December 1, 1884. Upon the execution of the bond, the plaintiff paid $1,000 as part of the purchase money, and gave three notes for $3,000, the balance, each note being for $1,000, payable in one, two, and three years respectively. She occupied the place during the Cottage City seasons of 1883 and 1884, paying the taxes of 1883, and early in 1883 made repairs or improvements, as she now claims, at the request of Mrs. Berry.

In the latter part of 1884 she expressed, in a letter dated November 23, 1884, her intention to give up the property, contending that the title was defective, and surrendered the keys, or some of them, to the defendant's agent. In the spring of 1885 she had a personal interview with the defendant, at which she

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sought to arrive at a settlement. Failing in this, she brought this action, contending that she had rescinded the contract.

When the case was before us upon a former bill of exceptions, (*Linton* v. *Allen*, 147 Mass. 231,) it was held that the agreement was "that Mrs. Berry should sell the land to the plaintiff for $4,000, — $1,000 to be paid down, and $1,000 within one year, $1,000 within two, and $1,000 within three years, — for which she was to give notes payable at three different dates, but with the privilege of anticipating payments, and that possession should be given on March 1, 1883, and the deed should be given upon the payment of the notes. The bond was given upon the payment of the $1,000, and the delivery of the notes to secure the performance of the agreement by Mrs. Berry." It was further held, upon a review of the authorities, that "such a contract would not be performed by Mrs. Berry by tendering a deed which did not convey the title to the land; and her inability and refusal to give a good title would excuse the plaintiff from performing the conditions on her part to be performed, and entitle her to recover back the money paid; . . . that the plaintiff was not entitled to demand a deed of the property until she had paid or was ready to pay her notes in full; that she was entitled to claim a good title to the property and not a properly executed warranty deed only."

After this decision, at the second trial, the presiding justice, against the defendant's objection, submitted to the jury three questions, which, with the answers of the jury, were:

"1. Was the contract rescinded by the mutual consent of the parties after said Allen became administrator?" "Yes."

"2. Was the contract abandoned by mutual consent of the parties after said Allen became administrator, leaving the parties in the state in which they were at the time of such abandonment?" "No."

"3. Was the plaintiff ready and willing to perform her part of the contract, and did she notify the defendant, and request the performance of his part, and did the other party refuse or neglect to perform the contract?" "Yes."

The presiding justice ruled that Mrs. Berry had never been in a condition to give the plaintiff a good title, owing to the restrictions and conditions in her deed, and the evidence as to

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what had been her use of the premises, and the location of the building, and submitted the case to the jury, upon instructions which allowed a verdict for the plaintiff if they found that she had been willing and ready to perform her part of the contract, and that the other party had refused or neglected, upon demand for a deed, to give one. The jury returned a verdict for the plaintiff.

We consider only the exceptions which have been argued.

1. If the presiding justice was right in submitting the case to the jury, he clearly might ask them to answer the three questions. Both rescission and abandonment were in issue at the trial. No reason is urged why the submission of these questions was prejudicial to the interests of the defendant, and none appears to us. The exception to their submission is overruled.

2. It will be convenient to examine early the correctness of the ruling, that Mrs. Berry was not in a condition to give a good title on account of the conditions and restrictions contained in her deed. That deed contained, after the description, the following clause: "The cottage not to be erected nearer the avenue than five feet, and five feet from the adjoining lots." Then followed, among other conditions, — a breach of any one of which, it was provided, should work a forfeiture of the estate, and reinvest it in the grantor, — a condition that the grantee should within one year cause to be erected on the granted premises "a dwelling-house, to be used exclusively as a residence for a private family." The habendum is to the grantee, and her heirs and assigns, "so long as he and they shall well and truly keep and perform the conditions hereinbefore contained." The covenants are of seisin in fee, freedom "from all incumbrances, except as herein set forth," of good right to sell and convey, and that the grantor "will warrant and defend the same to the said Chloe E. Berry, her heirs and assigns forever." The bill of exceptions states that the evidence showed that the house upon the lot had been used by Mrs. Berry as a boarding and lodging house, and had been let by her in 1882 for that purpose; it also appears that the uncontradicted evidence tended to show that after the erection of the house on lot 135, and the purchase of the adjoining half of lot 137 by her, an addition was made to

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the house extending to the line of lot 137, and a piazza built out to the line of the avenue. The land described in the bond was lot 135 and one half of lot 137. It appears that Mrs. Berry had acquired her title to the one half of lot 137 from one Harrison, to whom it had been conveyed by a deed similar to that under which Mrs. Berry held lot 135. The defendant asked the court, among the rulings mentioned above, to rule "that the deeds of the Oak Bluffs Company did not create a restriction or condition which could be enforced in respect to the position of the buildings on the lots"; "that the conditions contained in the deeds of lots 135 and 137 Circuit Avenue did not make the titles to the lots bad"; and "that the title to lots 135 and 137 Circuit Avenue was good, and notwithstanding the conditions mentioned in the deeds."

In support of his exceptions to the refusal to give these rulings, and to the instruction given, the defendant argues that the conditions were by the deed itself made unenforceable by the only party who could take advantage of them, the grantor and those claiming under him being estopped by the general covenant of warranty from making any claim upon the property, and cites the cases of *White* v. *Patten*, 24 Pick. 324, and *Estabrook* v. *Smith*, 6 Gray, 572. The latter case states only the familiar doctrine, that if one who has no title conveys with warranty, and afterwards acquires title and conveys to another, the second grantee is estopped from claiming that his grantor was not seised at the time of the first deed. In *Estabrook* v. *Smith*, the defendant had conveyed to the plaintiff lands subject to a mortgage, and had excepted the mortgage in his covenant against incumbrances, but had made a general covenant to warrant and defend against the lawful claims and demands of all persons; and the case holds that the mortgage was not excepted from the covenant of warranty. The ground stated for holding that the covenant of warranty was not restricted nor limited by the restricted covenant against incumbrances was, that the two were not connected covenants of the same import and directed to one and the same object, and that the grantor might well covenant to warrant against the eviction of his grantee by the holder of the mortgage, though he could not covenant against all incumbrances without rendering himself forthwith liable to an

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action. This doctrine falls far short of supporting the contention that a general covenant of warranty estops a grantor from claiming a breach of explicit conditions incorporated in the granting part of the same deed, and restricting the future use of the property. Such a construction of the covenant would render the conditions wholly nugatory. But effect is to be given to all the words of the instrument, and the true meaning is to be extracted from a comprehensive view of the whole. *Sumner* v. *Williams*, 8 Mass. 162, 218. *Browning* v. *Wright*, 2 B. & P. 13. It would be a forced and unnatural construction, plainly contrary to the intent of the parties, to hold that by such a warranty a grantor had estopped himself from claiming a breach by his covenantee of conditions upon which the same deed declared that the estate was to be held. That which the covenantor in such a deed undertakes to warrant and defend against all lawful claims is not the land, or an absolute and unqualified estate in it, but "the premises"; that is, the defeasible estate conveyed by the preceding grant, upon conditions expressed in the same deed. The defendant's exceptions upon this branch of the case must, therefore, be overruled.

3. The presiding justice was right in refusing to order a verdict for the defendant. At this trial there was evidence tending to show the giving of the bond, the payment of the one thousand dollars by the plaintiff, and an uncured defect in the obligor's title; also that the plaintiff had been ready and willing to complete the payment for the property and accept a deed which should convey to her a good title, and that she had caused statements to be made to that effect to Mrs. Berry, and after her death to those in charge of her estate. There was undisputed evidence that no such deed had been tendered to her, and that no deed conveying a title free from the defect could have been made by Mrs. Berry or her representatives or devisees. There was also evidence tending to show that before bringing suit she had given up the possession of the estate, and tried to procure a settlement with the defendant, contending that she had not been able to get a good title to the property, and was entitled to something from Mrs. Berry's estate. But there was no evidence or claim that she had made an actual tender of the amount due upon her notes.

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The defendant, in addition to his theory of title, of which we have disposed, rests his contention that a verdict should have been ordered in his favor upon the ground that there was no absolute refusal to convey, and that there must have been such an absolute refusal to waive the necessity of tender by the plaintiff. In support of this position he relies upon the case of *Brown* v. *Davis*, 138 Mass. 458. That was a case in which both parties to the bond for a deed remained inactive, neither being ready to perform his contract. It holds that an actual tender was not necessary, but that the plaintiff must show that he was ready, willing, and able to do his part, and the defendant had notice thereof, and that nothing short of this would put the defendant in legal default. In the case at bar the testimony of the plaintiff and of the witness Smith tended to show that she was ready (which includes the ability to perform) and willing to perform her agreement, and that she notified the other party thereof, and requested a conveyance. The weight of this evidence was for the jury, and the defendant's exception to the refusal to order a verdict in his favor, or to rule that the plaintiff could not maintain her action, must be overruled.

4. The same considerations govern the question raised by the exception to the refusal to rule "that if neither the defendant or Mrs. Berry, or Mr. Berry as special administrator, or Mr. C. F. Allen as executor, refused to give the plaintiff a good title, and did not do any act which would make the conveyance of a good title impossible, the plaintiff, in order to recover on the count on the bond, must show a tender of payment of the notes."

5. The ruling requested, "that if Mrs. Berry and all those who represented her estate were always ready and willing to give the plaintiff a good title, upon the performance by her of all that she was required to do, and did not refuse so to do, and did not put it out of their power so to do, the plaintiff cannot recover," was also properly refused, because there was no evidence that Mrs. Berry or any of her representatives were ever in a condition to convey a good title, without which they could not be ready, in a legal sense, to give the plaintiff such a title.

6. The request to rule "that the fact that incumbrances existed on the title of the property did not of itself excuse the

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plaintiff from making a tender of the amounts due on the notes," was properly denied, as a request founded upon a particular portion of the evidence only, the presiding justice having given sufficient and correct instructions to enable the jury to deal with the whole evidence bearing upon the question whether a tender was necessary.

7. The remaining exceptions to the refusal of instructions relate to the following requests:

"That a demand for the deed and offer to pay the amount due on the notes, to be effective for the purpose of this action, must have been made either upon Mrs. Berry, Mr. C. F. Allen as executor, or upon this defendant."

"That a demand on Mr. Berry, as special administrator or as husband of Mrs. Berry, if any were made, for a deed or title, does not affect the defendant in this action."

"That no legal demand for a deed could be made of Mr. Berry, either as special administrator or personally."

"That all communication with the defendant happening after the letter of November 23, 1884, is not material on the question of the plaintiff's readiness to perform her part of the contract, or her offer to do so."

It would be sufficient to require us to overrule these exceptions, that, while the defendant's bill shows that they were requested and not given, it fails to show either that no instructions were given on the points embraced in the requests, or that correct instructions upon those points were not given. Its statement of the charge is introduced by saying, "The judge charged the jury, among other things, as follows." Under these circumstances it is to be presumed that instructions not stated were given upon the matter to which the requests relate, and that they were correct. We do not, however, overrule these exceptions upon this ground only. The first three are based upon the theory that no demand or offer made on or to Mr. Berry could be material. But Mr. Berry in the lifetime of his wife acted as her agent, after her death was for a time the special administrator of her estate, and is the residuary legatee under her will. The exceptions do not state sufficient facts to enable us to see that no demand upon or offer to him could have been material, and the inference that the contrary doctrine was cor-

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rect is strong. The last request is clearly erroneous. Whether a readiness and offer to perform upon the part of the plaintiff, after her letter of November 23, 1884, in which she stated that she had concluded to give up the property, would have put the other party in default or not, communications between her and the defendant after that date would be admissible and material upon the questions of rescission, abandonment, and breach of contract, which were upon trial.

8. The defendant further contends that the plaintiff can maintain no action for money expended on the repair of the property, or for the taxes paid, because of her failure to perform the conditions of her contract, and he argues that the plaintiff cannot recover for repairs or taxes, for the same reason that she cannot recover for payments of purchase money. This reason fails, because the jury has in effect found that there was no failure on the plaintiff's part to perform her agreement. We see no error in this part of the case.

9. The first exception which the defendant argues to the admission of evidence relates to the admission of parol evidence of the contents of a letter which one Smith, called as a witness by the plaintiff, testified that he wrote to Mrs. Berry after he had received a certain letter written by her husband at her request on January 7, 1883. Smith was a real estate agent, who had acted for both the plaintiff and Mrs. Berry. He had negotiated the sale to the plaintiff, and drawn the bond for a deed. He had testified that the plaintiff came to him and wanted to know if she could make repairs, and that, in consequence, he wrote to Mrs. Berry that the plaintiff wanted a title to the property. The defendant's counsel then produced a letter from the witness to Mrs. Berry, dated February 20, 1883, and stated that it was the only letter in his possession. The witness then stated, without objection, the contents of the letter to which he had first testified, and was asked whether he wrote more than one letter to Mrs. Berry, and testified that he did. The plaintiff then introduced a letter to the witness, dated January 7, 1883, written by Mr. Berry at his wife's request, acknowledging the receipt of a letter from the witness on the night before, and saying, "She says go ahead and make the improvements contemplated, and she will make it all right," etc. The witness

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was then asked if he wrote at any time again, and answered that he wrote several letters to Mrs. Berry about the property. The plaintiff's counsel then read a notice to produce the letters written in January or February by Mr. Smith to Mrs. Berry, and proposed to put in the contents "of what letters we wrote." The defendant objected, on the ground that Mrs. Berry had never received any such letters, and that no response was produced. Upon this objection the plaintiff's counsel produced a letter from Mr. Berry, written at his wife's request to Smith, dated February 20, 1883, and saying, among other things, "Yours of the 19th is just come to hand, and my wife wishes me to say in reply that she will see that Mrs. Linton has a good title to the place according to agreement. It seems that you did not get my other letter, for I have written the same once before." The defendant's counsel then asked the witness, "You said you wrote two letters?" and was answered, "I wrote more than two letters, for I wrote two letters particularly in regard to the title." The presiding justice then directed the letter of January 7 to be shown to the witness, and asked him whether the letter of his own, produced by the defendant's counsel and claimed to have been written by the witness on February 19, was in reply to Mr. Berry's letter of January 7, or to some other one. The witness answered that it was in reply to some other one, and then gave the contents of his letter to which he said Mr. Berry's of January 7 was in reply. He was then asked, "Did you after that write again another letter?" to which he answered, "I did write several letters to Mrs. Berry," and "Will you please state what you next wrote to Mrs. Berry?" to which he answered, "It was merely a duplicate of what I wrote here [in his letter of February 19] demanding a title." The court then asked, "That was after you had received the letter of January 7 that you wrote again?" and, after an affirmative answer said, "I think that is admissible"; and the defendant excepted. The witness was then asked to state what he said, and replied that he demanded the title, testifying that he could not give it word for word as he wrote it, but that his demand for Mrs. Linton was the title to the property, as he had sold it to her, and that in reply to that letter he received nothing more than the two letters. If there were no evidence tending to

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show the receipt by Mrs. Berry of this letter, which the witness testified he had written to her between January 7 and February 19, it is impossible that its admission should have prejudiced the defendant, since the testimony given was that it was merely a duplicate of his letter of February 19, which was produced, and in which he wrote, "All Mrs. Linton wants to know is if you will back her against any claim the Oak Bluffs Company have on the place." But there was some evidence of the receipt of such a letter by Mrs. Berry. In the first place, the witness evidently used the words "write" and "wrote" in their common acceptation, which, as applied to epistolary correspondence, includes as well the sending or mailing of the communication as its mere inditing. In the next place, Mr. Berry's letter of February 20, — after stating in reply to the demand of the letter of the 19th, "All Mrs. Linton wants to know," etc., that his wife wishes him to say in reply "that she will see that Mrs. Linton has a good title to the place according to agreement," — adds, "It seems that you did not get my other letter, for I have written the same once before." This cannot refer to the letter of January 7, since no statement in the two letters is identical. It is a fair inference that the letter of February 20 refers to a letter written by Mr. Berry between January 7 and that date; and because he says that he has written the same once before, it is also a fair inference that what he had written once before was in reply to the letter which the witness had testified was merely a duplicate of his letter of the 19th, and which thus appeared to have been received and replied to by Mrs. Berry. For these reasons this exception is overruled.

10. Upon cross-examination the same witness was asked if, at the time of the execution of the bond, he said anything to Mrs. Berry about conditions; and the defendant excepted to the exclusion of the question. He now argues that it was a proper one, because the plaintiff was present at the time, and that conversation in the presence of the parties was competent to show that at the time the plaintiff knew of the conditions on the property. The exception must be overruled. It is not stated in the bill of exceptions that the plaintiff was present, and no mention of that claim was made when the question was excluded. Whether the plaintiff knew of the conditions when the bond was given was immaterial.

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11. The remaining exception was to the admission of conversations between the plaintiff and Mr. Berry, occurring on June 30 and July 9, 1884, when he was special administrator, on occasions when she made him payments upon the notes, which he demanded. He was then the sole legal representative of Mrs. Berry, had the right to collect any demands due to her estate, and was the only person to whom the plaintiff could go if she wished to make payment. The will having been established before the trial, it was known that, as residuary legatee, he was at the time of the conversations also seised of the land, and that his conveyance of it at that time would have passed any title of which Mrs. Berry had died seised, subject only to the liability to be devested by a conveyance by an executor or administrator if required for the payment of debts or legacies, or by proceedings under the Pub. Sts. c. 142, § 1, for the specific performance of her agreement to convey. The defendant was contending that the plaintiff had failed to perform her own contract, and the effect of her payments depended upon the circumstances under which they were made.

We think the evidence was competent, as characterizing the acts of payment which they accompanied, and also as tending to show a readiness on her part to perform her own agreement upon a condition upon which she had a right to insist, that is, upon the conveyance to her of a good title. The substance of the conversations was merely that, upon his demand for the payment of the notes, she hesitated, and declared her unwillingness to pay out more money without a good title, and that she would like to pay if he would give her a good title, and, finally, that she would pay no more until she got a title. The exception to its admission must, therefore, be overruled.

Upon the whole case the result is, that, no error appearing upon the consideration of such of the defendant's exceptions as he has chosen to argue, the exceptions must be overruled, and there must be,

Judgment for the plaintiff on the verdict.

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GUSTAF A. HOLST *vs.* JOSEPH I. STEWART & another.

Suffolk. March 4, 1891. — October 23, 1891.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Deceit — False Representations — Pleading.

In an action of deceit, it is not enough to allege a false representation, but in some form it should be alleged that the representation was fraudulently made.

Under a declaration for false representations, not alleged to have been made *scienter* or upon the defendant's personal knowledge, evidence that the defendant made the representations in question is immaterial.

TORT, against Joseph I. Stewart and Ezra F. Pratt, for false representations, with a count in contract. Trial in the Superior Court, before *Blodgett*, J., who, after a verdict for the plaintiff, allowed a bill of exceptions, the substance of which appears in the opinion.

B. C. Moulton, for Pratt.

H. L. Boutwell, for Stewart.

F. A. Perry, for the plaintiff.

LATHROP, J. The declaration in this case contains three counts, the first two of which are for distinct torts. The third count is in contract, for money had and received, and apparently applies to the cause of action set forth in the first count. A general demurrer was filed to the first two counts, which was overruled in the Superior Court, and the defendants appealed to this court. The case was then tried in the Superior Court. The judge ruled that the plaintiff could not maintain his action on the first and third counts, to which ruling no exception was taken by the plaintiff; the case was submitted to the jury on the second count; a verdict was returned for the plaintiff, and the defendants excepted to the refusal of the judge to give certain instructions requested.

In this position of the case it does not appear to us to be necessary to decide whether the first and third counts set forth a good cause of action, and we confine ourselves to the second count, and to the defendants' exceptions.

The second count alleges, in substance, that the plaintiff bought of one Saunders a tenement and lot of land in North

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Stoughton; that the defendants, to induce the plaintiff to purchase the same, "falsely represented to the plaintiff that the railroad trains took aboard passengers at and left the depot in North Stoughton, nearest to" said tenement and lot, "for Boston every week day at 5.50 of the clock in the morning, and lots of trains out from Boston, which would stop at North Stoughton in the evening"; that the plaintiff, believing the representations to be true, was thereby induced to purchase said tenement and lot of land; that the representations were untrue; and that the plaintiff was prevented from getting to and from his work in Boston without great additional expense and loss of time, and was compelled to keep a horse and wagon therefor.

The principal objection to the declaration is, that it does not allege that the representations were fraudulently made. Fraud is undoubtedly the gist of the action. It is not enough to allege a false representation, but in some form it should be alleged that the representation was fraudulently made. *Pearson* v. *Howe*, 1 Allen, 207. *Hartford Ins. Co.* v. *Matthews*, 102 Mass. 221.

The plaintiff relies upon the case of *Litchfield* v. *Hutchinson*, 117 Mass. 195, in support of his contention that the declaration in the case at bar is sufficient. No question, however, was raised in that case as to the form of the declaration, and, although the declaration did not use the word "fraudulently," it alleged that the representations were false, and knowledge of this fact on the part of the defendant.

The demurrer to the second count should therefore have been sustained.

At the trial, the plaintiff offered evidence that one of the defendants made the representations set forth in the declaration. The defendants objected to the admission of this evidence, on the ground that such representations were immaterial, because not alleged to have been made *scienter*, or upon the defendants' personal knowledge. The court ruled that such allegations were unnecessary, and admitted the evidence, and the defendants excepted.

For the reasons above stated, we are of opinion that this ruling was wrong; and that the evidence was immaterial, as the declaration stood.

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We need not consider the other exceptions. They depend upon the character of the evidence, which may not be the same if the case should be tried again.

Exceptions sustained.

LUTHER P. WIGGIN & another *vs.* HENRY C. BUTCHER & others.

Suffolk. March 12, 1891. — October 23, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Contract of Sale — Warranty — Rescission.

A statement in a letter of instructions from a seller to his agent relative to hams offered for sale, that "there is an occasional ham sour in the marrow," coupled with the question, "Why do you not get the buyer to try them off in body and marrow, and make a careful inspection, and report best bid for them?" is not a warranty that not so many as one third of the hams were sour in the marrow.

TORT, for false representations, with counts in contract for money received by the defendants to the plaintiffs' use and upon an account annexed, to recover the price of fifty tierces of hams, sold by the defendants to the plaintiffs.

At the trial in the Superior Court, without a jury, before *Hammond*, J., it appeared in evidence that the defendants, on May 11, 1888, wrote to Joseph W. Stone, a provision broker who acted as their agent in relation to the hams in question, as follows: "The three tierces of Squire's hams are a sample of the lot, and we want to sell them on sample. Some of them are not sweet in the marrow. They have been in the very finest cold storage possible, not above 38 degrees at any time. We believe that Squire's price for pickled hams is now 10¼ to 10½, and we still sell these hams at 9½, freight paid to Boston, if we cannot do better, but we do not guarantee them sound in body and marrow. We want to sell them for what they are."

There was also evidence, and the judge found as a fact, that the hams were bought by the plaintiffs of Stone, upon representations made by the defendants in another letter written by the

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defendants to Stone on May 15 following, which was as follows: "Dear Sir, — Your favor of the 14th received and noted. What little pickle there was on the hams would naturally be sour, but the hams are not sour. There is an occasional ham sour in the marrow. Why do you not get the buyer to try them off in body and marrow, and make a careful inspection, and report best bid for them? We hope to be able to sell them here to some better advantage than we authorized you to sell them, namely, 9½, in a few days. If you can do anything, though, please report by wire."

The plaintiffs also introduced evidence tending to show, and the judge found as facts, that the plaintiffs did not intend that the hams should be sold upon the letter of May 15 by itself, and made no other representations of the quality or condition of the hams than those contained in the letters above set forth, which comprised all the authority or instructions which Stone had for making the sale; and that no other letter of the defendants than the one of May 15 was shown to the plaintiffs by Stone before the purchase. It also appeared that the plaintiffs paid for the hams upon receipt of the bill of lading, and before seeing them; that immediately upon receiving the hams they refused to accept them on account of their being sour in the marrow, and immediately reported that fact to Stone; and that Stone requested the plaintiffs to smoke some of the hams, which the plaintiffs did, and thereupon they claimed to rescind the contract, and declined to accept the hams, and offered to return the same to the defendants, but the defendants declined to accept them.

The judge filed the following memorandum with his finding: "I find as facts, that plaintiffs bought the hams after seeing the letter of May 15, 1888, which letter was shown the plaintiffs by the agent of the defendants; that no other representations were made to the plaintiffs as to the hams; that at the time the letter was so shown to the plaintiffs and the trade made, the hams were not sour, but that one third of them were sour in the marrow; that upon the arrival of the hams in Boston the plaintiffs took ten tierces to their store, examined them, and smoked them, and then declined to take the rest, and claimed to rescind the contract. I find that the defendants acted in good faith."

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The judge found for the defendants; and the plaintiffs alleged exceptions.

The case was argued at the bar, in March, 1891, and afterwards, in June following, was submitted on the briefs to all the judges.

R. Lund & W. E. Jewell, for the plaintiffs.

A. E. Pillsbury, for the defendants.

LATHROP, J. On the facts found by the justice of the Superior Court, who heard the case without a jury, the only question open to the plaintiffs is whether the finding should, as matter of law, have been entered for the plaintiffs.

The plaintiffs seek to rescind the sale on the ground that the statement in the letter of May 15, 1888, that "there is an occasional ham sour in the marrow," amounted to an affirmation of the quality of the hams, and constituted a warranty that not so many as one third of the hams were sour in the marrow.

In the opinion of a majority of the court, this statement cannot be treated as such a warranty. The letter which contained the statement was merely a letter of instructions from the sellers to their agent. The expression used was a very indefinite one, "an occasional ham." See *Hogins* v. *Plympton*, 11 Pick. 97, where the words "good fine wine," were said to be "too uncertain and indefinite to constitute such warranty." The expression dealt with a subject about which it was difficult, if not impossible, to have exact knowledge, namely, the condition of the marrow in the hams. It suggested to the agent to get the buyer (and this must mean the person proposing to buy) "to try them off in body and marrow, and report best bid for them." This was equivalent to saying that tests and a careful inspection would be necessary to ascertain what the condition of the hams was. The letter was a fair warning that some undetermined part of the hams was sour in the marrow.

All of the Justices agree that the exceptions should be overruled, and a majority of the court concurs in the reasons above given.

Exceptions overruled.

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FLORENCE PROUT *vs.* INHABITANTS OF THE FIRE DISTRICT IN PITTSFIELD.

Berkshire. September 24, 1891. — October 23, 1891.

Present: ALLEN, HOLMES, KNOWLTON, & MORTON, JJ.

Fire District — Liability for Negligence — Compromise.

A fire district is a quasi corporation, to whose inherent power to sue and be sued the general power to compromise doubtful claims is necessarily incident.

A fire district, duly organized and established under the St. of 1844, c. 152, (Pub. Sts. c. 35, §§ 40–61,) which is sued for personal injuries caused by the alleged negligence of its fire department, or of its officers or members, may, after a verdict for the plaintiff, waive exceptions taken by it at the trial, and by vote compromise the claim for a sum less than the verdict, and is bound by the plaintiff's unreserved acceptance thereof.

CONTRACT, to recover a sum of money voted to be paid by the defendant in compromise of a claim of the plaintiff, upon which an action of tort brought by her against the defendant was still pending in the Superior Court. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, which, so far as material to the points decided, appear in the opinion.

H. L. Dawes & J. C. Crosby, for the plaintiff.

M. Wilcox & W. R. Plunkett, for the defendant.

ALLEN, J. The defendant is a fire district, duly organized and established under the general laws of the Commonwealth. St. 1844, c. 152. Pub. Sts. c. 35, §§ 40–61. By express provision of statute, fire districts may raise money for the purchase of engines and other articles necessary for the extinguishment of fires, for the purchase of land, for the erection and repairs of necessary buildings, for the erection and maintenance of street lamps within their limits, and for other incidental expenses of the fire department. Pub. Sts. c. 35, § 51. Certain other powers were specially conferred upon the defendant by the Legislature, in respect to water supply, and to sewers and drains. St. 1852, c. 210. St. 1867, c. 132.

By virtue of its general authority, the defendant established an electric fire alarm system, one of the wires of which ran into

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the house where the plaintiff lived, and during a thunder-storm she was injured by electricity conducted into the house by means of the wire. It is not controverted that the establishment of the fire alarm system was within the defendant's authority.

The plaintiff sued the defendant for this injury, and obtained a verdict with substantial damages in the Superior Court, under instructions from the presiding justice authorizing the same to be rendered. Exceptions were taken to these instructions, and, before the same were argued in this court, the defendant passed the vote which is the subject of the present action, appropriating a sum less than the verdict, to be paid in compromise of the action and claim; and the plaintiff accepted the vote, and the offer therein contained.

The defendant now contends that it was not liable in the first instance for any negligence of the fire department, or of its members and officers, and that it was wholly beyond its power to assume liability therefor by a compromise of the plaintiff's claim. This latter ground of objection is clearly untenable, and we have therefore no occasion to consider the former.

The defendant as a fire district is a quasi corporation, with certain limited corporate powers, which are to be measured by its other powers, its privileges and duties. Among its inherent corporate powers is the power to sue and be sued. *Rumford School District* v. *Wood*, 13 Mass. 193. *Stebbins* v. *Jennings*, 10 Pick. 172, 188. *Linehan* v. *Cambridge*, 109 Mass. 212. 2 Kent Com. 277, 278, 283, 284, and notes. Angell & Ames, Corp. §§ 23, 24, 78. 1 Dillon Mun. Corp. §§ 21, 22.

The general power to compromise doubtful and disputed claims is necessarily incident to the power to sue and the liability to be sued. If a claim against the defendant cannot be adjusted by way of compromise, neither could a claim in its favor. If this doctrine were applied generally to all claims, the result would be that in all disputed cases the defendant must perforce engage in a litigation, the expense of which would be certain, but the result doubtful. The defendant would be under the necessity of insisting at all hazards upon a judicial determination of all its controverted rights, and would be bound to pursue or resist all doubtful claims until final adjudication by the court of last resort.

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The learned senior counsel for the defendant does not carry his objection so far as this, but he contends that liability for negligence of the kind now in question is so far removed from any obligation imposed upon the defendant by law, that it was entirely outside of its powers to assume any such liability, even by way of compromise. This argument overlooks the ground upon which compromises rest, and are upheld by courts. Whether the result of a litigation depends chiefly upon the ascertainment of the facts by the verdict of a jury, or upon the determination of the rules of law found applicable by the court, in either case there is an uncertainty until the decision is reached. No better illustration could be needed than the present case affords. The counsel for the defendant asks us to say that the rules of law so clearly exempted the fire district from liability, that a settlement of the claim by way of compromise was *ultra vires*. But the learned justice of the Superior Court ruled that the fire district might be held liable. It certainly could not be said, therefore, that the law was so plain as to be free from doubt. It must at least be assumed that the defendant was involved in a litigation in which the result might be adverse to it. If the defendant had chosen to rest content with the verdict of the jury and the ruling of the judge of the Superior Court, there would have been a final judicial determination that it was liable. Could it be urged, in such a case, that it would be beyond its powers to raise money to pay the judgment against it? Or could it be urged that it would be beyond its powers to submit to the result in the Superior Court, without taking or pressing in this court exceptions in matters of law?

What the defendant has done is, in effect, to agree to waive its exceptions taken at the trial in consideration that the plaintiff will accept a sum less than the verdict of the jury. This verdict was rendered in the due course of the administration of justice. Although subject to be set aside upon a further hearing in this court of the matters of law involved in the case, it was *prima facie* an obligation resting upon the defendant which it was in great danger of being compelled to meet. Certainly the plaintiff's claim cannot be said to be merely frivolous or vexatious, or one not urged in good faith. It must be conceded that the plaintiff, or those acting for her, might well believe in its

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justice and legality, since the court and jury have, upon a trial, upheld it. There is no suggestion of fraud or misrepresentation practised on the defendant. Under these circumstances, we can see no good ground for holding that the compromise was beyond the power of the fire district, or that its promise to pay was founded on no sufficient consideration. The power is incident to its liability to be sued. *Cushing* v. *Stoughton*, 6 Cush. 389. *Drake* v. *Stoughton*, 6 Cush. 393. *Matthews* v. *Westborough*, 131 Mass. 521, and 134 Mass. 555. *Medway* v. *Milford*, 21 Pick. 349, 354. *Bean* v. *Jay*, 23 Maine, 117. *Petersburg* v. *Mappin*, 14 Ill. 193. *Agnew* v. *Brall*, 124 Ill. 312. *Supervisors of Orleans* v. *Bowen*, 4 Lans. 24, 30, 31. *Supervisors of Chenango* v. *Birdsall*, 4 Wend. 453. 1 Dillon Mun. Corp. §§ 30, 477, 478. The plaintiff's claim, whether on a final determination it might or might not be found to be valid, was sufficiently substantial to furnish a good consideration for the compromise. *Barlow* v. *Ocean Ins. Co.* 4 Met. 270. *Cobb* v. *Arnold*, 8 Met. 403. *Allis* v. *Billings*, 2 Cush. 19, 25, 26. *Leach* v. *Fobes*, 11 Gray, 506. *Kerr* v. *Lucas*, 1 Allen, 279. *Easton* v. *Easton*, 112 Mass. 438, 443. *Riggs* v. *Hawley*, 116 Mass. 596. *Wilton* v. *Eaton*, 127 Mass. 174, 175. *Union Bank* v. *Geary*, 5 Pet. 99, 114. *Miles* v. *New Zealand Alford Estate Co.* 32 Ch. D. 266, 283, 284, 291, 292, 297, 298. *Ex parte Banner*, 17 Ch. D. 480. *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449. *Cook* v. *Wright*, 1 B. & S. 559. Met. Con. 177. Pollock, Con. (Wald's ed.) 181, 182, 407. Chit. Con. (11th Am. ed.) 35–41, 46–50.

The case of *Palfrey* v. *Portland, Saco, & Portsmouth Railroad*, 4 Allen, 55, is to be distinguished on the ground that there it was plain that the plaintiff had no real claim to be compromised; and *Wade* v. *Simeon*, 2 C. B. 548, rests on the same ground.

The defendant's further objection, that the plaintiff has given no complete and unreserved acceptance of the defendant's vote cannot prevail. The plaintiff's acceptance was complete and unreserved, but the defendant's prudential committee sought to repudiate the defendant's vote, the effect of which, if successful, would be to leave the plaintiff's original action as it was. The plaintiff has never withdrawn from her agreement to accept the sum voted by the defendant in full satisfaction of all her claims.

Judgment for the plaintiff affirmed.

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PAUL K. L. E. KRELL & another *vs.* ROBERT CODMAN.

Suffolk. November 12, 13, 1890. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, LATHROP, & BARKER, JJ.

Voluntary Covenant — Public Policy — Enforcement.

A voluntary covenant, in an indenture under seal executed in England, by which a testatrix, who afterwards dies domiciled in this Commonwealth, promises that her executors shall within six months after her death pay to the other parties thereto, upon certain trusts, a specified sum, with interest from the day of her death, is not contrary to the policy of the laws of this State, and is enforceable here after her decease.

CONTRACT, against the executor of the will of Martha G. Wheelwright, upon a covenant in an indenture under seal, dated February 13, 1885. The case was heard in January, 1890, by *Field*, J., and reported by him for the consideration of the full court, and was as follows.

The indenture was executed by "Martha Gerrish Wheelwright, of Roslyn House, Oatlands Park, in the county of Surrey, widow, of the one part, and Paul Karl Ludwig Emil Krell of the same place, Esquire, and Charles Watkins of No. 19 Oakley Square in the parish of St. Pancras in the county of Middlesex, Esquire, of the other part," and provided as follows: "Whereas the said Martha Gerrish is desirous of making some provision for Constance Hope Eagle, the adopted child of the said Paul Karl Ludwig Emil Krell, and of his wife, Maria Augusta Krell, the daughter of the said Martha Gerrish Wheelwright, the said Constance Hope Eagle being now seven years of age and residing at Roslyn House, Oatlands Park, aforesaid, — Now this indenture witnesseth that in consideration of the love and affection of the said Martha Gerrish Wheelwright for the said Constance Hope Eagle, and for divers other good causes and considerations, the said Martha Gerrish Wheelwright doth hereby covenant with the said Paul Karl Ludwig Emil Krell and Charles Watkins, or the survivor of them or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents (hereinafter called the trustees or trustee), that, in case the said Constance Hope Eagle

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shall survive her the said Martha Gerrish Wheelwright, the executors or administrators of her the said Martha Gerrish Wheelwright shall, within six calendar months after her death, pay to the trustees or trustee the sum of £2500, with interest thereon at the rate of four per cent per annum from the day of her death: provided always that the said Martha Gerrish Wheelwright shall be at liberty to pay the said sum of £2500, or any part thereof, to the trustees or trustee at any time during her lifetime." The indenture then provided that the trustees should invest the sum above named only in English or Colonial securities, and should hold the same for the benefit of Constance Hope Eagle; but it was further agreed that, "if the said Constance Hope Eagle shall not survive the said Martha Gerrish Wheelwright, or surviving her shall not live to attain the age of twenty-one years, nor to marry under that age, then subject to the trusts and powers hereinbefore declared and contained, or by law vested in the trustees or trustee, shall stand possessed of the trust premises and the income thereof, in trust for the said Martha Gerrish Wheelwright, her executors, administrators, and assigns absolutely."

This indenture was drawn and settled on behalf of all parties by a firm of English solicitors, and executed at Walton-on-Thames, Surrey, England. By the law of England a covenant such as that contained in this instrument constitutes a debt of the covenantor legally chargeable upon his or her estate, ranking after debts for value, but before legacies. At the date of the indenture Mrs. Wheelwright was living with her daughter, who was the wife of the first named plaintiff, and the child Constance Hope Eagle was living with and supported by Mr. and Mrs. Krell, but was never legally adopted by them. She was still a minor, and lived with them in England. Mrs. Wheelwright died on August 30, 1888, and at the time of her death was domiciled in Newburyport in this Commonwealth, and her will, which was executed in this Commonwealth on October 10, 1881, was duly proved here.

The judge found that, at the time Mrs. Wheelwright executed the indenture, her place of residence and home were in England, but her political domicil was in Massachusetts. If the plaintiffs were entitled to maintain the action, judgment was to be entered

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for them for the sum named in the indenture, with interest; otherwise, judgment was to be entered for the defendant.

The case was argued at the bar in November, 1890, and afterwards, in October, 1891, was submitted on the briefs to all the judges except *Field*, C. J. and *Morton*, J.

C. K. Cobb, (*F. E. Brooks* with him,) for the plaintiffs.

R. Codman, Jr., for the defendant.

HOLMES, J. This is an action on a voluntary covenant in an indenture under seal, executed by the defendant's testatrix in England, that her executors, within six months after her death, should pay to the plaintiffs, upon certain trusts, the sum of £2,500, with interest at four per cent from the day of her death.

It is agreed that by the law of England such a covenant constitutes a debt of the covenantor legally chargeable upon his or her estate, ranking after debts for value, but before legacies. But it is contended by the defendant that a similar instrument executed here would be void. The testatrix died domiciled in Massachusetts, and the only question is whether the covenant can be enforced here. If a similar covenant made here would be enforced in our courts, the plaintiffs are entitled to recover, and in the view which we take on that question it is needless to examine with nicety how far the case is to be governed by the English law as to domestic covenants, and how far by that of Massachusetts.

In our opinion, such a covenant as the present is not contrary to the policy of our laws, and could be enforced here if made in this State. If it were a contract upon valuable consideration, there is no doubt it would be binding. *Parker* v. *Coburn*, 10 Allen, 82. We presume that, in the absence of fraud, oppression, or unconscionableness, the courts would not inquire into the amount of such consideration. *Parish* v. *Stone*, 14 Pick. 198, 207. This being so, consideration is as much a form as a seal. It would be anomalous to say that a covenant in all other respects unquestionably valid and binding (*Comstock* v. *Son*, *ante*, 389, and *Mather* v. *Corliss*, 103 Mass. 568, 571) was void as contravening the policy of our statute of wills, but that a parol contract to do the same thing in consideration of a bushel of wheat was good. So, again, until lately an oral contract founded on

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a sufficient consideration to make a certain provision by will for a particular person was valid. *Wellington* v. *Apthorp*, 145 Mass. 69. Now, by statute, no agreement of that sort shall be binding unless such agreement is in writing, signed by the party whose executor is sought to be charged, or by an authorized agent. St. 1888, c. 372. Again, it would be going a good way to say by construction that a covenant did not satisfy this statute.

The truth is, that the policy of the law requiring three witnesses to a will has little application to a contract. A will is an ambulatory instrument, the contents of which are not necessarily communicated to any one before the testator's death. It is this fact which makes witnesses peculiarly necessary to establish that the document offered for probate was executed by the testator as a final disposition of his property. But a contract which is put into the hands of the adverse party, and from which the contractor cannot withdraw, stands differently. See *Perry* v. *Cross*, 132 Mass. 454, 456, 457. The moment it is admitted that some contracts which are to be performed after the testator's death are valid without three witnesses, a distinction based on the presence or absence of a valuable consideration becomes impossible with reference to the objection which we are considering. A formal instrument like the present, drawn up by lawyers and executed in the most solemn form known to the law, is less likely to be a vehicle for fraud than a parol contract based on a technical detriment to the promisee. Of course, we are not now speaking of the rank of such contracts *inter sese*. *Stone* v. *Gerrish*, 1 Allen, 175, cited by the defendant, contains some ambiguous expressions, but was decided on the ground that the instrument did not purport to be and was not a contract. *Cover* v. *Stem*, 67 Md. 449, was to like effect. The present instrument indisputably is a contract. It was drawn in English form by English lawyers, and must be construed by English law. So construed, it created a debt on a contingency from the covenantor herself, which if she had gone into bankruptcy would have been provable against her. *Ex parte Tindal*, 8 Bing. 402; *S. C.* 1 D. & Ch. 291, and Mont. 375, 462. Robson, Bankruptcy, (5th ed.) 274. The cases of *Parish* v. *Stone*, 14 Pick. 198, and *Warren* v. *Durfee*, 126 Mass. 338, were actions on promissory notes,

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and were decided on the ground of a total or partial want of consideration.

There is no question here of any attempt to evade or defeat rights of third persons, which would have been paramount had the covenantor left the sum in question as a legacy by will. There is no ground for suggesting an intent to evade the provisions of our law regulating the execution of last wills, — if such intent could be material when an otherwise binding contract was made. See *Stone* v. *Hackett*, 12 Gray, 227, 232, 233. There was simply an intent to make a more binding and irrevocable provision than a legacy could be, and we see no reason why it should not succeed.

Judgment for the plaintiffs.

GEORGE J. MORSE *vs.* GEORGE W. ELY.

Hampden. September 22, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Infant — Contract — Rescission during Minority — Return of Consideration.

An infant credited his employer on account of wages for moneys due him on an exchange of a horse for a cow, for the services of a stallion and a bull, for a calf, and for pasturage, all at reasonable prices, under contracts fairly made and beneficial to the infant. He sold the cow and the colt resulting from the stallion's service for cash at their full value. *Held*, that during infancy he might elect to avoid the contracts and recover his wages without deduction or putting the defendant *in statu quo*.

CONTRACT, brought by an infant for wages alleged to be due him from the defendant. Trial in the Superior Court, without a jury, before *Bond*, J., who found for the plaintiff for the amount claimed by him, and allowed a bill of exceptions, the substance of which appears in the opinion.

C. L. Gardner, for the defendant.

J. B. Carroll, for the plaintiff.

BARKER, J. The plaintiff, when of the age of twenty years and in the employment of the defendant, agreed with him that there should be applied toward the payment of his wages a sum

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of $10, the difference between the price of a horse and that of a cow which he received in exchange from the defendant, and also further sums for the services of a stallion and of a bull, and for a calf which he bought of the defendant, and for the pasturage of a horse. These items were credited by the minor in his account with his employer. The contracts from which they resulted were fairly made, the prices were reasonable, and all the contracts were in fact beneficial to the minor. The cow, and a colt resulting from the service of the stallion, have been sold by him at their full value, for cash. Whether he is yet in the possession of the calf does not appear. He has elected to avoid his contracts with the defendant, and has brought this action to recover for his wages, without deduction for any of the items. The question raised by the bill of exceptions is whether, under the circumstances, the defendant is entitled to be credited with their amount.

None of the contracts were for necessaries. The plaintiff had therefore a right to avoid them at his election, and it was not necessary for him, in order so to do, to return the consideration received, or to put the other party *in statu quo*. *Chandler* v. *Simmons*, 97 Mass. 508, 514. *Bartlett* v. *Drake*, 100 Mass. 174, 177. *Walsh* v. *Young*, 110 Mass. 396, 399. *Dubé* v. *Beaudry*, 150 Mass. 448. *Boody* v. *McKenney*, 23 Maine, 517. *Price* v. *Furman*, 27 Vt. 268.

If the sums which the defendant seeks to apply in payment had been actually paid to him in money, the plaintiff, upon rescinding his contracts, could recover them back. *McCarthy* v. *Henderson*, 138 Mass. 310. *Pyne* v. *Wood*, 145 Mass. 558. The defendant cannot avail himself of and enforce, by way of an allegation of payment, contracts which he could not enforce by a direct suit. *McCarthy* v. *Henderson*, 138 Mass. 310. To allow him to do so would be to affirm and enforce against the minor contracts which for his protection the law allows him to rescind.

Exceptions overruled.

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THOMAS BRYANT *vs.* PECK AND WHIPPLE COMPANY.

Hampden. September 22, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Duress — Equitable Relief.

A person who becomes a party to a promissory note running to a corporation, and transfers stock to it, in consideration that it will not prosecute his son for perjury committed as its treasurer in making a return under the Pub. Sts. c. 106, § 54, and under its threat that otherwise his son would be prosecuted, is subjected to duress, and is entitled to equitable relief, although the transaction was an illegal one under the Pub. Sts. c. 205, § 27.

BILL IN EQUITY, filed in the Superior Court, alleging that the plaintiff, on or about December 16, 1889, became a party to a promissory note for $2,000, with his son, George T. Bryant, running to the defendant corporation, and at the same time assigned to it in writing thirty shares of its capital stock owned by him, of the par value of $3,000; that there was no legal consideration for the plaintiff's becoming a party to the note, or for such transfer of shares, but the plaintiff was induced to do both by the representations made to him by the defendant, and its officers and agents acting for it, that his son, who was its treasurer, had as such treasurer prepared a return for the defendant such as is required to be made and filed in the office of the Secretary of the Commonwealth annually under the Pub. Sts. c. 106, § 54, and had with its other officers signed and made oath to the same, which return had been duly filed, that some of the statements therein as to its condition were not true, and were then known by his son not to be true, whereby his son was guilty of the crime of perjury, and liable to be imprisoned in the state prison, and that for this crime his son would be by them prosecuted criminally unless he signed the note and made over the shares in its favor, but that his son would not be prosecuted if he signed the note and made over the shares; that to protect his son from threatened criminal prosecution, he became party to the note and transferred the shares; that he became party to the note and transferred the shares under duress; and that

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the defendant refused upon demand to deliver up the note, or to strike his name therefrom, or to restore to him such shares.

The prayer of the bill was for a cancellation of the note or for striking his name therefrom, and for a retransfer of such shares to him, and for further relief.

The Superior Court sustained a demurrer filed by the defendant for want of equity; and the plaintiff appealed to this court.

W. G. Bassett, for the plaintiff.

G. M. Stearns, for the defendant.

HOLMES, J. According to the allegations of the bill, the plaintiff became a party to the note from which he prays to be relieved, and transferred his stock, in consideration that the defendant would not prosecute his son for perjury, and under a threat from it that otherwise his son would be prosecuted. The transaction was illegal; Pub. Sts. c. 205, § 27; *Gorham* v. *Keyes*, 137 Mass. 583; and if the parties stood on an equal footing, neither of them would have a remedy against the other. *Atwood* v. *Fisk*, 101 Mass. 363. But it is well recognized that, although both parties are chargeable with knowledge that their agreement is contrary to some rule of law, yet if one of them acts under duress, or what the law regards as undue influence on the part of the other, they do not stand on an equal footing, and the weaker one may be granted affirmative relief. *Worcester* v. *Eaton*, 11 Mass. 368, 376. *Belding* v. *Smythe*, 138 Mass. 530, 533. It is settled that such threats as are alleged to have been addressed to the plaintiff constitute duress. *Harris* v. *Carmody*, 131 Mass. 51. See *Rau* v. *Von Zedlitz*, 132 Mass. 164. And accordingly it has been decided in other jurisdictions, in cases like the present, that the plaintiff was entitled to relief in equity. *Foley* v. *Greene*, 14 R. I. 618. *Schoener* v. *Lissauer*, 107 N. Y. 111. *Williams* v. *Bayley*, L. R. 1 H. L. 200. *Davies* v. *London & Provincial Ins. Co.* 8 Ch. D. 469, 477. See *Sharon* v. *Gager*, 46 Conn. 189; *Rau* v. *Von Zedlitz*, 132 Mass. 164, 167–169.

In *Atwood* v. *Fisk*, *ubi supra*, cited as establishing a different conclusion, it seems to have been found or assumed that the plaintiffs had not been subjected to any undue pressure, as the decision states that there was "no such inequality in position, or abuse of advantages, as to entitle them to the aid of the court on the ground of public policy." *Demurrer overruled.*

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NELLA H. POMEROY *vs.* INHABITANTS OF WESTFIELD.
DEXTER C. PHELON *vs.* SAME.

Hampden. September 22, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Defective Highway — Due Care — Volunti non fit injuria.

In an action for personal injuries, alleged to have been caused by a defect in a highway, there was evidence that the travelled part of the way at the point in question was thirteen or fourteen feet wide, and that more than half of this on the plaintiff's left as he was driving thereon in the night-time was made impassable, or was in such condition that it was prudent to avoid it, by a deep mud-hole therein which left barely room for one wagon to pass; and that the plaintiff, who was well acquainted with the road and understood its dangers and was on his way home, kept to the right in the effort to avoid the hole, and in the darkness went off the travelled part of the way and was upset by a ditch or rock within its limits, and injured. *Held*, that the questions whether there was a defect, and whether the plaintiff was in the exercise of due care, were for the jury.

TWO ACTIONS OF TORT, for personal injuries occasioned to the plaintiffs respectively by an alleged defect in a highway which the defendant town was bound to keep in repair. The cases were tried together in the Superior Court, before *Mason*, C. J., who allowed a bill of exceptions, in substance as follows.

There was evidence that the highway in question was a much travelled way leading from Westfield in a westerly direction to Granville; that on April 14, 1890, in the evening, the plaintiff Phelon started to drive home from Westfield to his home in Granville along this way, accompanied by the plaintiff Pomeroy; that his horse was safe and his wagon and harness suitable, and he was well acquainted with the road and its condition; that, in driving, the plaintiff Phelon sat on the right hand side of the wagon seat towards the northerly side of the road; that the portion of the road where the defect was alleged to exist was lined with trees on either side, and when they approached it at about nine o'clock it was very dark; that at the point in question was a covered stone culvert extending entirely across the way, and a short distance to the east of it a rock cropped out within the way projecting above the surface from three to six

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inches; that the travelled part of the way was from thirteen to fourteen feet in width, and had been wrought for travel during the year before; that within the way as thus wrought, towards the southerly or left hand side thereon as the plaintiff was driving, there was on either side of the culvert a mud-hole from five to seven feet in length running with the road and from five to six feet in width, in which the mud was from six to eighteen inches deep; that west of the culvert, and on the northerly side of the road, was a ditch or gutter, which was about one and a half feet below the level of the road and was made in building the road; that scattered along the northerly side of the way, west of the culvert and north of the ditch, were from ten to twelve pieces of rock, some of which had been blasted out of the road and deposited there, and the nearest of which was within three feet of the travelled part of the way; that this condition of things had existed for two or three weeks, and during that time, as the plaintiff Phelon had noticed, teams going over the road had kept on the northerly side thereof until the culvert and the mud-holes were passed; that north of the mud-holes and between them and the ditch the road was comparatively hard, and the driving there was better than on the southerly side; that the space thus travelled between the mud-holes and the ditch was barely sufficient for one team to pass; that just before the plaintiffs reached the projecting rock, the plaintiff Phelon, knowing that he was coming to a dangerous place and that the horse was accustomed to the road and knew more about going in the dark than he did, allowed his horse in the darkness to go unguided around the mud-holes and past the culvert; and that the horse walked past the first mud-hole of the culvert and for ten or twelve feet beyond it, and then started to trot, when the wagon was in a moment tipped over, and the plaintiffs were thrown out, the plaintiff Pomeroy striking upon a rock about six feet from the travelled part of the way nearly opposite the westerly mud-hole, and both were injured.

The defendant requested the judge to rule that there was no evidence to warrant a finding that there was a defect, or that the plaintiffs, or either of them, were in the exercise of due care; but the judge declined so to rule, and submitted the cases to the jury.

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The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

H. W. Ely, (*A. S. Kneil* with him,) for the defendant.

M. B. Whitney, for the plaintiffs.

HOLMES, J. These are actions for personal injuries alleged to have been caused by a defect in a highway. There was evidence that the travelled part of the way, at the point where the plaintiffs left it, was thirteen or fourteen feet wide, and that more than half of this part, on the plaintiffs' left as they were driving, was made impassable, or at least was in such a condition that it was prudent to avoid it, by reason of a deep mud-hole, so that there was left barely room for one team to pass; that the plaintiffs kept to the right in the effort to avoid the hole, and, it being dark, went off the travelled part of the way, and were upset by a ditch or rock within the limits of the way. The question is whether the judge should have directed a verdict for the defendant, on the ground either that there was no evidence of a defect, or that there was no evidence of due care on the part of the plaintiffs.

The jury were warranted in finding that the mud-hole was a defect, and that under the circumstances the injury to the plaintiffs was a natural consequence of a proper attempt to keep out of the hole. The intervention of a prudent act of this sort on the plaintiffs' part would not prevent their recovery. *Flagg* v. *Hudson*, 142 Mass. 280. *Hayes* v. *Hyde Park*, 153 Mass. 514.

The strongest argument for the defendant would be, that, although there is evidence of a defect, and although the conduct of the plaintiffs at the instant was prudent, yet they, or at least the plaintiff Phelon, the driver, had taken the risk upon themselves at an earlier moment by electing to travel upon the road, inasmuch as Phelon was well acquainted with the road and understood its dangers. *Miner* v. *Connecticut River Railroad*, 153 Mass. 398. Perhaps this argument might be met by saying that it was a question for the jury in this case whether Phelon did understand the dangers fully. *Ferren* v. *Old Colony Railroad*, 143 Mass. 197, 200. In one sense, the event proves that he did not, since he undoubtedly expected to get through safely. *Thomas* v. *Western Union Telegraph*, 100 Mass. 156, 158. *Mahoney* v. *Metropolitan Railroad*, 104 Mass. 73, 75. *Dewire* v. *Bailey*, 131 Mass. 169, 171.

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But, further, in determining the right of a plaintiff to recover, there are two elements to be considered; first, how far he is chargeable with knowledge of the danger which he incurred, and then under what exigency he acted. That is to say, the exigency legitimately may affect not only the question how far he appreciated or ought to have appreciated the danger, but also how far he could run a risk known to be greater than prudently could be incurred under ordinary circumstances without losing his right to recover in case he was hurt. Especially is this true in cases like the present, where the parties are not in an equal position. The plaintiffs were away from home, and had to get back. They depended on the defendant for safety in doing so, and it was the defendant's power and duty to keep the way free from defects.

In such a case, even if it were found that the plaintiffs knew that they were attempting a dangerous drive, it could not be said, as matter of law, that they were not warranted in doing so. The decisions have carried this principle much further than is necessary for the purposes of the case at bar. *Linnehan* v. *Sampson*, 126 Mass. 506. *Eckert* v. *Long Island Railroad*, 43 N. Y. 502. *Pennsylvania Co.* v. *Langendorff*, 48 Ohio St. 316. *Donahoe* v. *Wabash, St. Louis, & Pacific Railway*, 83 Misso. 560. *Maus* v. *Springfield*, 101 Misso. 613, 618.

Exceptions overruled.

SELIG MANILLA *vs.* ANDREW J. HOUGHTON & another.

Hampden. September 22, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Evidence — Agency — Account annexed.

Evidence of a request by the plaintiff, in an action to recover for personal services as agent in selling the defendant's property, made to a third person, to urge the defendant to sell the property to the purchaser, is insufficient to justify the admission of declarations by such third person in regard to the relation of the plaintiff to either of the parties.

A plaintiff in an action to recover for personal services in selling property, who fails to establish a special agreement by the defendant to pay him therefor, may

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recover on an account annexed also contained in his declaration, if there is evidence to justify an estimate of the value of the plaintiff's services under this count; and evidence tending to show what the transaction was, accompanied by testimony that the plaintiff told the defendant at their first interview that the commissions for sales at good prices were five per cent on the amount received for the property, is sufficient for that purpose.

CONTRACT, upon an account annexed, to recover $15,000 for the plaintiff's "services in negotiating sale of brewery property" belonging to the defendants, with counts upon an alleged agreement by the defendants to pay the plaintiff the same amount for the same services.

At the trial in the Superior Court, before *Mason*, C. J., it was in issue whether, in negotiating a sale of the defendants' brewery, the plaintiff acted as their agent or as the agent of one Untermeyer, who represented certain capitalists desirous of purchasing such property. The defendants, in order to show that the plaintiff was the agent of Untermeyer, introduced evidence that one Sinclair had several interviews with the plaintiff and Untermeyer; that Untermeyer told Sinclair that he was negotiating for breweries, and urged Sinclair to see and persuade the defendant Houghton to sell to Untermeyer for the price that he communicated through the plaintiff. The defendants then offered to show what the interview was between Sinclair and Houghton; but the judge, upon the plaintiff's objection that it was not had in the presence of the plaintiff, excluded the testimony; and the defendants excepted. The defendants then introduced evidence that the plaintiff requested the defendant Houghton to have an interview with Sinclair, and that Houghton told the plaintiff that he would hear what Sinclair might have to say, and the plaintiff said he would speak to Sinclair about it; that thereupon the plaintiff did go to Sinclair and requested him to see Houghton; and that Sinclair, at a subsequent interview, the plaintiff not being present, said to Houghton, "I want to advise you to sell your brewery; they offer you a pretty good price, and I think you had better take it." The plaintiff objected to further evidence of this interview, on the ground that it took place in the absence of the plaintiff, and the judge excluded the testimony; and the defendants excepted.

The plaintiff testified that, at the first interview he had with

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Houghton, the latter asked him, "How is it about the commission in selling breweries?" and he replied that commissions at present at good prices were five per cent on what he got; and the plaintiff testified further, that the defendant Houghton agreed to give him $25,000 commissions. No other evidence was offered as to the value of the plaintiff's services.

The judge instructed the jury, in accordance with the plaintiff's contention, that, if he had not proved the special contract alleged to have been made by him with the defendants for such commission, then the plaintiff was entitled, upon his account annexed, to recover for the value of the services rendered by him; and the defendants excepted.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

G. D. Robinson, (*I. R. Clark* with him,) for the defendants.

W. W. McClench, (*J. B. Carroll* with him,) for the plaintiff.

KNOWLTON, J. The defendants offered to put in evidence the declarations of one Sinclair, in the absence of the plaintiff, as tending to show that the plaintiff in what he did about the sale was the agent of Untermeyer, and not of the defendants. These were rightly excluded, for the reason that there was nothing to show that Sinclair was authorized by the plaintiff to make them. *Boynton* v. *Laighton*, 1 Allen, 509. *Bowker* v. *Delong*, 141 Mass. 315. The evidence relied on by the defendants to show Sinclair's authority goes no further than a request to Sinclair by the plaintiff to see the defendant Houghton, and to urge him to sell his brewery to Untermeyer. This request was entirely consistent with an honest purpose on the part of the plaintiff, as the agent and friend of the defendants, to induce them to make the sale, because he believed it for their interest to make it. It has no tendency to show that Sinclair was the plaintiff's agent for any other purpose than to advise the sale, and it does not justify the introduction of declarations of Sinclair in regard to the relation of the plaintiff to either of the parties.

The ruling that, if the plaintiff failed to establish the special contract declared on, he might recover on the account annexed if in the opinion of the jury the evidence warranted it, was correct. *Harrington* v. *Baker*, 15 Gray, 588. *Fitzgerald* v. *Allen*, 128 Mass. 232. *Simmons* v. *Lawrence Duck Co.* 133 Mass. 298.

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There was sufficient evidence to justify an estimate of the value of the plaintiff's services under this count. The jury were informed what the transaction was, and were entitled to apply their common knowledge to the facts of the case. Besides, there was testimony that, at the first interview between the plaintiff and the defendant Houghton, the plaintiff told Houghton that the commissions for sales at good prices were five per cent on the amount received for the property. This was competent to be considered in determining what such services were worth. *Exceptions overruled.*

PATRICK BRADY *vs.* LUDLOW MANUFACTURING COMPANY.

Hampden. September 22, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Employers' Liability Act — Negligence — Election.

An employer is not liable, either at common law or under the St. of 1887, c. 270, for personal injuries occasioned to an employee by reason of a defect in a machine or appliance, or of the employer's failure to instruct him respecting his duties, if the only defect relied on had no connection with the accident, and there was no defect or danger of which it was the employer's duty to warn the employee, or any particular in which the employee should have been instructed.

At the trial of an action against an employer for personal injuries sustained by an employee, in which the declaration contains counts at common law and under the employer's liability act, presenting different issues and involving different liabilities in damages, it is within the discretion of the presiding judge to require the plaintiff to elect whether he will go to the jury on the counts at common law, or on those framed upon the statute.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. The declaration, which was in four counts, alleged that the plaintiff while in the exercise of due care was injured in the defendant's factory; the first count, which was at common law, alleged that he was injured by a failure of the defendant to give him sufficient instructions as to his duties, and to notify him of the dangers and perils incident thereto;

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the second, which was framed on the St. of 1887, c. 270, § 1, cl. 1, alleged that he was injured by the failure of the defendant, or of some person in his service intrusted with that duty, to keep the ways, works, and machinery in proper condition; the third, which was framed on the St. of 1887, c. 270, § 1, cl. 2, alleged that he was injured by the negligence of some person in the defendant's service intrusted with and exercising superintendence, and whose sole and separate duty was that of superintendence; and the fourth, which was also at common law, alleged that he was injured by the defendant's failure to furnish suitable machinery and appliances for the prosecution of the plaintiff's work as an employee, and negligence in not keeping them in good repair and condition.

At the trial in the Superior Court, before *Mason*, C. J., there was evidence that the plaintiff, who was at the time of the accident seventeen years and eleven months old, was employed at that time, and had been thus employed for some seven or eight weeks, upon a carding machine in the defendant's factory; that upon the side of this machine, in plain sight, were about eighteen gears of various sizes, moving in different directions, and some of them revolving very rapidly; that enclosing this machine, and at a distance of about five inches therefrom, was an iron fence made of light iron rods and bars, which covered the gears, and was so constructed that one half of it formed a gate; that this gate was made to swing automatically, and when closed rested upon a tongue or dog projecting from the side of the machine, and was secured by the bottom rail of the gate resting in a slot or groove near the end of this tongue; that it was the safer way thus to have the gate shut automatically; that waste material would accumulate both under and over the gears of this machine, and it was a part of the plaintiff's duty to remove this waste, and he had been instructed by the defendant's foreman to do so when the machine was in motion; and that just before the accident, and shortly after eight o'clock in the morning, the plaintiff, in order to remove waste from the machine, opened the gate and stood in the gap thus formed, as it was necessary to do, and while thus at work was struck in the back by the gate as it swung to, and was pushed or fell forward upon the machine, and was caught by the gears and seriously injured.

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The only defect relied on by the plaintiff was the defective condition of the gate in this, that when the gate came to, instead of the bottom rail sliding upon the tongue and falling into the slot and there remaining, it would strike against the end of the tongue and there remain only until the vibration of the machinery caused it to rebound, when it would stand open a foot or two; or if the bottom rail did slide into the slot, it would not remain fastened there, but the jar of the machinery would dislodge it and cause it thus to stand open unless moved by hand. The plaintiff, in describing the accident, testified that in freeing the gears from waste he stepped "between the fence and the machine, and put my arm in and pulled the waste away. There was more waste there than usual. As I was doing this, the gate slammed on me and knocked me in between the gears. I had both hands on the waste, trying to release it. I was there about a minute before I got caught."

On cross-examination, the plaintiff admitted that he could see well enough at the time he was injured; that he could see the gears plainly, and saw they were running, and could see where he put his hand; that he knew the gate was standing open, and no one swung it on to him, but he thought he hit the gate with his back as he was getting up, after taking the waste from underneath the gears, when he had to go down on his knees and was getting up to take the waste from the top of the gears. He testified, "I know I must have touched it when getting up." He also testified that he knew that if he got caught in the gears he should get hurt, and that he "did not need any instructions about that."

At the conclusion of the evidence, the judge, at the defendant's request, ruled that the plaintiff must elect to proceed under the first and fourth counts, or, the third count having been waived, under the second count; and the plaintiff excepted. The plaintiff elected to go to the jury on the first and fourth counts, and the judge thereupon, at the defendant's request, ruled that the evidence was not sufficient to go to the jury, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. B. Carroll, for the plaintiff.

G. D. Robinson & F. H. Gillett, for the defendant.

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KNOWLTON, J. The only defect relied upon by the plaintiff in this case was an alleged defective condition of the gate. No claim was made on account of the gears, and it was admitted by the plaintiff that he understood the danger of injury from them, and that he needed no instructions about them.

The defect in the gate was, that when swung together it would not catch on the fastening, and if fastened would not stay so, but would stand a little way open. There was no contention that the gate was defective in any other particular. It was designed to close automatically, and the undisputed testimony of witnesses for the plaintiff and for the defendant was that this was the best mode of construction for the use for which it was designed. It was not a heavy gate, but was made of light iron rods, and the evidence tended to show that it would remain at rest when partly open, unless something came in contact with it and moved it. The accident seems to have been caused by the plaintiff's hitting the gate when he was getting up to take the waste from the top of the gears. He said in testifying, "I know I must have touched it when getting up." It was necessary to have the gate open when the gears were being cleaned. Upon the undisputed facts, there was no defect or danger of which it was the defendant's duty to warn the plaintiff, or any particular in which the plaintiff should have been instructed. He understood the dangers involved in cleaning the gears as well as anybody, and the defendant had no reason to fear an accident, except from causes which were obvious to the plaintiff. There was no evidence to warrant a verdict for the plaintiff on the first count. *Ciriack* v. *Merchants' Woolen Co.* 146 Mass. 182. *Crowley* v. *Pacific Mills*, 148 Mass. 228. *Probert* v. *Phipps*, 149 Mass. 258, 260.

The fourth count is founded on the alleged defect in the gate. But the defect had no connection with the accident. If the device for fastening the gate had worked perfectly, it would have made no difference to the plaintiff, for he could not clean the gears without keeping the gate open. There was no evidence that he was injured by reason of any defect or want of repair in the defendant's machinery or appliances.

We are of opinion that it was within the discretion of the presiding judge to order the plaintiff to elect whether he would

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go to the jury in that trial on the counts at common law, or on those founded upon the statute. In some cases a jury may be able to deal with different counts, founded on the same facts, presenting different issues, and involving different liabilities in damages, at the same time without great difficulty, and it may be just to both parties to submit them to the jury together. In other cases, the presiding judge may see that such a mode of trial would be likely to lead to confusion, and to prevent the jury from reaching a correct result. Much must be left to the discretion of the presiding judge in determining what is conducive to an orderly trial and an intelligent verdict.

In the present case, the reasons that required a verdict for the defendant under the first and fourth counts apply equally to the second and third; so that the plaintiff would not have been injured by the ruling requiring him to elect, if it had been unwarranted in law. *Exceptions overruled.*

ALFRED D. DAY & others *vs.* AMAZIAH MAYO, JR.

Hampden. September 23, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Mutual and Open Account — Partial Payment — Statute of Limitations.

Where a partial payment is made on account of an existing indebtedness, the whole debt upon which such payment is made is thereby taken out of the statute of limitations up to that time; and if the payment was made to apply upon an indebtedness consisting of many items, all of them will thereby be saved from the effect of the statute.

CONTRACT, upon an account annexed, to recover $1,449.49, with interest thereon from June 12, 1884, when it was alleged demand was made for the same. The answer set up the statute of limitations. Writ dated June 7, 1890. The case was submitted to the Superior Court upon the following agreed statement of facts:

"The defendant was indebted to the plaintiffs on March 20, 1884, for merchandise sold and delivered by the plaintiffs to defendant, in the sum of $5,108.90, less sundry cash payments

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which the defendant had made on account of said indebtedness. Subsequent to said date, March 20, 1884, the defendant made other cash payments on account, all of which were made more than six years prior to the suing out of the plaintiff's writ, except the last cash payment of one hundred dollars made by the defendant, which last payment was made on June 12, 1884, which last payment was within six years prior to the suing out of said writ. If the plaintiffs are entitled to recover, they are entitled to recover $1,449.49, and interest thereon from June 12, 1884."

The Superior Court ordered judgment for the defendant; and the plaintiffs appealed to this court.

F. E. Carpenter, for the plaintiffs.

C. L. Long, for the defendant.

ALLEN, J. This case was submitted to us by the defendant upon a brief, without oral argument, and the only ground taken in defence is that "no fact is shown which can be claimed to take the account out of the operation of the statute of limitations, except the fact that a payment of one hundred dollars has been made on the account within six years; such a payment will not so operate"; citing *Parker* v. *Schwartz*, 136 Mass. 30, as an authority in support of the proposition. This argument, however, is founded upon a misapprehension of the scope of that decision; and since the justice of the Superior Court who heard the present case appears to have shared in that misapprehension, a restatement of the rules applicable to that case and to this may be expedient.

A statutory provision has long been in force in this Commonwealth, that, in actions brought "to recover the balance, due upon a mutual and open account current, the cause of action shall be deemed to have accrued, at the time of the last item proved in such account." Rev. Sts. c. 120, § 5. Gen. Sts. c. 155, § 5. Pub. Sts. c. 197, § 8. The construction put upon this provision has been, that, in case of a mutual and open account current, such as is contemplated by the statute, the statute of limitations begins to run at the time of the last item on either side of the account, and in such case a plaintiff may recover the whole balance due to him upon such account if he proves any item upon his own side within the period of limitation, although there has been no

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item upon the defendant's side of the account within that time. *Penniman* v. *Rotch*, 3 Met. 216. *Whipple* v. *Blackington*, 97 Mass. 476. *Safford* v. *Barney*, 121 Mass. 300. But an item which is merely a payment made by the defendant on account of the items charged against him by the plaintiff will not have the effect to make the account a mutual and open one within the meaning of the statute. Such a payment is not a matter of separate and independent charge; it is merely a partial extinguishment of an existing indebtedness. It does not, therefore, create the mutual and open account current to which the statute gives the peculiar privilege of extending the time of limitation so that it begins to run at the time of the last item proved on the side of the plaintiff, even though all the items on the side of the defendant are of earlier date. Such was the decision in *Parker* v. *Schwartz*, 136 Mass. 30, in which no payment had been made by the defendant within the period of limitation, but on the strength of earlier payments the plaintiff sought to bring his case within the special doctrine applicable to the statutory mutual and open account current. No question was involved in that case as to the proper and ordinary effect of a payment, but the court, out of abundant caution, said, "Each payment would, of course, have the effect of a payment, in taking the account upon which it was made out of the statute of limitations." This rule of the common law is familiar, and it is recognized and preserved in the provision of the Pub. Sts. c. 197, § 16, that "nothing contained in the preceding section shall alter, take away, or lessen the effect of a payment of principal or interest made by any person."

Where a partial payment is made on account of an existing indebtedness, the whole debt upon which such payment is made is thereby taken out of the statute of limitations up to that time. The identity of the debt sued on with that upon which the payment was made must of course be established. But if it is shown that the payment was made to apply upon an indebtedness consisting of many items, all of them will thereby be saved from the effect of the statute. The payment is an acknowledgment of the existence of the indebtedness, and raises an implied promise at that time to pay the balance. *Penniman* v. *Rotch*, 3 Met. 216, 223. *Taylor* v. *Foster*, 132 Mass. 30. *Whipple* v. *Blackington*,

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97 Mass. 476. *Gilbert* v. *Collins*, 124 Mass. 174. *Buffinton* v. *Chase*, 152 Mass. 534.

The present case falls within this rule. The agreed statement of facts recites that the defendant was indebted to the plaintiffs for merchandise sold and delivered by them to him, in the sum of $5,108.90, less sundry cash payments which the defendant had made on account of said indebtedness. Subsequently, the defendant made other cash payments on account, the last of which was within six years prior to the suing out of the plaintiff's writ. We can give no other construction to the agreed statement of facts than that a payment of cash was made within six years on account of the indebtedness sued on, and this appears to be the construction adopted in the defendant's brief. The result is, that the plaintiffs are entitled to recover.

Judgment for the plaintiffs.

MARY E. SANDERS *vs.* INHABITANTS OF PALMER.

Hampden. September 23, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Defect in Highway — Evidence.

In an action against a town under the Pub. Sts. c. 52, § 18, for personal injuries caused by a defect in a highway, evidence of the amount of money raised by the town for the repair of highways in the year of the accident, and of the amount actually expended, may be considered, in connection with evidence of the population of the town, of the proportion of inhabitants that would naturally use the highway claimed to be defective, and of the number of miles of highway which the town was bound to keep in repair, upon the question whether the town did what was reasonable in regard to the repair of the highway upon which the plaintiff was injured.

TORT, under the Pub. Sts. c. 52, § 18, for personal injuries caused by an alleged defect in a cross-walk in a highway of the defendant town. At the trial in the Superior Court, before *Bond*, J., the defendant was permitted, without objection, to show the population of the town, the population of the different

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villages in the town, and the proportion of the inhabitants in the village where the accident occurred that would naturally use the cross-walk, and it also offered some evidence as to the number of miles of highway which it was bound to keep in repair. The defendant was also permitted, against the plaintiff's objection, to show the amount of money raised for the repair of its highways for the year in which the injuries were received, and the amount of money actually expended for that purpose. There was no evidence as to the valuation of the town, and a question as to the tax rate for the same year was excluded.

The judge instructed the jury that, in determining whether the alleged defect or want of repair might have been remedied, or whether the alleged injury might have been prevented by reasonable care and diligence on the part of the town and its officials, they might take into account the population, the amount of money expended by the town in the repair of its highways, and the situation of the place where the injury happened.

The judge further instructed the jury as follows: "Evidence has been introduced as to the amount of money the town raised this year, 1889, for the repair of its highways, and no evidence has been introduced as to the valuation of the town with a view of determining the burden which the ways, or the repair of the ways, were upon the town that year. They raised that amount of money. Now, in view of the amount that was raised, of the amount which it would have cost to have remedied this defect, if you find that there was one, you will say whether by the exercise of reasonable care and diligence on the part of the town this defect might have been remedied."

The plaintiff excepted to these instructions, and especially to so much thereof as instructed the jury to consider the amount of money the town raised during the year in which the accident occurred, and also to the admission of the evidence as to the money raised and spent by the town for the repair of its highways.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

S. S. Taft, for the plaintiff.

J. B. Carroll, for the defendant.

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KNOWLTON, J. Since the passage of the St. of 1877, c. 234, (Pub. Sts. c. 52, § 18,) it is competent, in the trial of a suit to recover damages for an injury received from a defect in a highway, to put in evidence any fact which tends to show what the town could reasonably have been required to do in keeping its ways safe and convenient for travellers. The length of the roads which it is obliged to maintain, the ease or difficulty of maintaining them, the amount of travel over them, and the amount of assessable property in the town, are all elements to be considered in determining how high a degree of excellence can reasonably be required of a town in the construction and repair of any particular piece of road. *Rooney* v. *Randolph*, 128 Mass. 580. *Hayes* v. *Cambridge*, 136 Mass. 402.

In many cases details of this kind will add little, if anything, to the general knowledge of what is reasonable that a jury is supposed to have, and much must be left to the discretion of the judge at the trial, when it is a question how far the parties shall be permitted to proceed in a controversy upon collateral issues.

In the case at bar, evidence was introduced, without objection, "to show the population of the town, the population of different villages in the town, and the proportion of the inhabitants in the village where the accident occurred which would naturally use the cross-walk." There was also evidence as to the number of miles of highway the defendant was bound to keep in repair. In connection with these facts, the amount of money raised by the town for the repair of highways the year of the accident, and the amount actually expended, were circumstances which might properly be considered upon the question whether the town did what was reasonable in regard to the repair of the walk on which the plaintiff was injured.

The bill of exceptions does not state what the evidence was, or disclose enough facts to enable us to determine whether it was important, or precisely what its bearing was on the other facts of the case. No question appears to have been made in relation to the propriety and reasonableness of the use which was made of the money expended, and it does not appear whether the whole, and, if not the whole, how great a part, of the money raised was paid out. But these facts were before the

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jury, and it is fairly to be inferred that the evidence was material. Certainly the plaintiff has not shown that it was not.

The instructions of the judge merely permitted the jury to consider these facts in connection with the other circumstances of the case, and were correct. *Exceptions overruled.*

THOMAS DILLON *vs.* CONNECTICUT RIVER RAILROAD COMPANY.

Hampden. September 23, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Railroad — Loss of Life — Trespass.

A railroad corporation owes no duty to trespassers anywhere within its location beyond abstaining from reckless and wanton conduct towards them; and this rule is not abolished by the Pub. Sts. c. 112, § 212, providing for a recovery of damages from such a corporation, except, in certain cases, for negligently causing the death of a person.

TORT, by the administrator of the estate of Martin Dacey, for causing his death. Trial in the Superior Court, before *Mason*, C. J., who, after a verdict for the defendant, allowed exceptions, which, so far as material to the point decided, appear in the opinion.

T. B. O'Donnell, for the plaintiff.

G. M. Stearns & G. Wells, (*W. W. McClench & J. Barnes* with them,) for the defendant.

HOLMES, J. This is an action, under the Pub. Sts. c. 112, § 212, for causing the death of the plaintiff's intestate, Dacey. Dacey was killed by a train running off the track while he was in a water-closet, which there was evidence tending to show to have been built without right within the defendant's location. The jury were instructed that, if Dacey was a trespasser, the defendant owed him no duty beyond abstaining from reckless or wanton conduct toward him. The jury found for the defendant; and the plaintiff excepted. If Dacey had been on the defendant's track, there is no question that the ruling would have

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been right. *McCreary* v. *Boston & Maine Railroad*, 153 Mass. 300. The ground of the decision cited is that the statute does not abolish the common law rule embodied in the instruction, and that rule applies with equal force to trespassers anywhere within the location. Whether this construction of the statute be reached by a broad interpretation of the exception of people "being upon its [the defendant's] road contrary to law," which qualifies the civil as well as the criminal liability, (see St. 1881, c. 199, § 1,) or by reading in an exception implied by common sense, does not matter for the purposes of this case. Compare *Taylor* v. *Carew Manuf. Co.* 143 Mass. 470, 471; *Blodgett* v. *Boston*, 8 Allen, 237, 238. *Exceptions overruled.*

GEORGE F. SMITH & others, petitioners.

Hampden. September 23, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Will — Construction.

A testatrix, who was the sole owner of a lot of land and with her daughter owned in common an adjoining lot, devised to such daughter "one half of the proceeds of all the real estate held by us," and then added a description which embraced both lots. *Held*, that the testatrix intended to make a devise which should affect both lots, and that the daughter was entitled to take one half of the testatrix's interest in the whole of the described estate.

PETITION, by George F. Smith and Mary J. Seymour, administrators with the will annexed of Mary Ann Smith, and by the legatees under the will, for instructions as to the distribution of the proceeds of certain real estate. The case was heard by *Knowlton*, J., who reserved it for the consideration of the full court, in substance as follows.

The testatrix was the sole owner of a lot of land in Monson, and she and her daughter, Mary J. Seymour, were the owners each of an undivided half, as tenants in common, of an adjoining lot, on which was a dwelling-house in which the testatrix lived. By the first article of her will the testatrix provided as follows: "To my daughter, Mary J. Seymour, who owns the homestead

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and the adjoining land jointly with myself, I desire to be given one half of the proceeds of all the real estate held by us in the town of Monson, county of Hampden, and State of Massachusetts, to wit, the estate bounded." Here followed a description by bounds which included both of the lots above mentioned. The lot of which the testatrix was the sole owner, and her undivided half interest in the other lot, had been duly sold under license of the Probate Court.

Mary J. Seymour contended that she was entitled to one half of the proceeds of the testatrix's interest in the lot which they owned together as well as one half of the proceeds of the other lot, while the remaining parties contended that she was not entitled to any of the proceeds of the testatrix's interest in the real estate held in common.

C. C. Spellman, for Mary J. Seymour.

C. L. Gardner, for the other petitioners.

ALLEN, J. The testatrix was the sole owner of one lot, and she and her daughter owned in common the adjoining lot. In her will she made the mistake of reciting that her daughter owned both lots jointly with herself, and proceeded to devise to the daughter "one half of the proceeds of all the real estate held by us," adding a description which embraced both lots. The parties agree that the daughter is entitled to one half of the proceeds of the lot owned solely by the testatrix, and the controversy relates only to the proceeds of the lot owned in common. The daughter in the petition claims to be entitled to one half of the proceeds of the interest of the testatrix in that lot, and the other parties deny that she is so entitled. We think the claim of the daughter must be sustained. The testatrix was disposing of her own estate, and apparently intended to make a devise to her daughter which should affect both lots. If she had merely intended to give to the daughter one half of the proceeds of the lot owned solely by herself, there would have been no occasion to mention the other lot at all. The language seems rather to mean that the daughter is to take one half of the interest of the testatrix in the whole of the described estate.

Decree accordingly.

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JOHN W. MASON & others *vs.* SILAS H. POMEROY & others.
WILLIAM TURNBULL & another *vs.* SAME.

Berkshire. September 23, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Equity — Res Judicata.

An equity case, in which it was sought to apply a trust estate to the payment of certain claims, was sent to a master, under a rule that all claimants, including the three trustees thereof, should establish their claims before him, and that those not doing so should be barred from sharing therein. The master reported the claims thus allowed, including debts of the second class, so called, which were incurred while the trust was being managed by one trustee alone, who had secured the other two trustees by a bond with surety. The two trustees, who were represented before the master and made no objection to his report, and whose counsel argued the case before this court, filed a petition in the case, more than a year after a rescript was sent ordering payments of claims of the second class, for a reconsideration of the former decision. *Held*, that the petition came too late.

TWO PETITIONS, by William Turnbull and Charles Atwater, two of the trustees under the will of Theodore Pomeroy, one filed on May 8, 1891, in the case of *Mason* v. *Pomeroy*, after the decision in that case reported in 151 Mass. 164, and the other in the case of *Turnbull* v. *Pomeroy*, also pending in this court, to "settle and determine the respective accounts of the trustees and their acts and doings in the premises, and the equities therein, and the amounts for which they are respectively entitled to indemnity from the trust estate, and the rights of the creditors thereunder." The petition in the case of *Turnbull* v. *Pomeroy* also asked for the appointment of a receiver, and alleged that the equities between the petitioners and Silas Harris Pomeroy, their co-trustee, had never been settled and determined, and that a bond given by him to them to secure them as co-trustee, with Henry W. King as surety, was still in force. The petitions were denied by a single justice of this court; and the petitioners appealed to the full court.

F. P. Goulding & T. P. Pingree, for the petitioners.

M. Wilcox, for the respondents.

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HOLMES, J. The more important of these cases is a petition in the cause of *Mason* v. *Pomeroy*, stated in 151 Mass. 164. The petition is filed by Turnbull and Atwater, two of the trustees under the will of Theodore Pomeroy, and practically seeks to obtain a reconsideration of the former decision, or at least to avoid its effect. It is unnecessary to state what is to be read in the former report. The suggestion now is that creditors of trustees can come against the trust fund only by way of subrogation to the right of the trustees; that the debts which were incurred while Silas Harris Pomeroy was managing the trust alone, called debts of the second class, were not incurred in the legitimate management of the trust; that the creditors of this class can come on the fund only through Pomeroy, and that he has no equity against the fund, but, on the contrary, is indebted to it to a large amount. Without considering nicely what is open upon this petition after the finding of the single justice, the answer to it, so far as it claims a further hearing upon the facts as matter of right, is that the petitioners have had their day in court. The case was sent to a master, under a rule that all persons making claims against the trust estate, including the trustees named in the will, should appear before him for the purpose of presenting and establishing their said claims, and that all persons not appearing after citation should be debarred from any share in the trust estate. The master filed his report of the claims so established and allowed, and he included among them the debts of the second class. The petitioners were represented before the master; they made no objection to this report; their counsel argued the case before this court, and this petition was not filed until more than a year after the rescript was sent ordering a decree for the plaintiffs' creditors of the second class.

It is true that the master states that he does not find whether Silas Harris Pomeroy did or did not carry on the business in accordance with the terms of the decrees of this court, but, however this statement is to be construed, it cannot be construed as leaving open, or as intended to leave open, any element of fact bearing on the right of creditors of the second class to share in the fund, — a right which was most explicitly denied by the answer of Turnbull and Atwater, and which was found to be established subject to the questions of law apparent on the face of the report.

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It is very possible that, if the master or the counsel for the petitioners had had the decision of this court before them, they would have paid more attention to the question of Silas Harris Pomeroy's equities. But this has no bearing on the rights of the petitioners, and at most could be taken into consideration if we are to regard the petition as an appeal to the discretion of the court to reopen the case, and to give the petitioners a chance to try the matters of fact alleged by them more fully than they did when they were entitled to go into those matters.

If we are to regard the petition as an appeal to our discretion, we feel more hesitation in dealing with it. On the whole, however, we should not feel justified in causing additional delay and expense to creditors in order to allow the further trial of a very doubtful case.

A receiver has been appointed by the consent of all parties in the case of *Mason* v. *Pomeroy*, and the assets are in his hands. The prayer for a receiver in the case of *Turnbull* v. *Pomeroy* was waived at the hearing. The rights of all parties in the fund have been determined in the Mason case, and practically there is nothing left to be done in the Turnbull case except to dispose of it formally. If Turnbull and Atwater have any claim against Pomeroy and his surety, King, on their bond, they can establish it by suit. *Petition denied.*

CHARLES DUMANGUE *vs.* ANASTASIA DANIELS.

Worcester. September 28, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Fraudulent Conveyance — Evidence.

On a writ of entry, brought under the Pub. Sts. c. 172, § 49, to recover a parcel of land as standing fraudulently in the tenant's name, it appeared that the demandant sustained personal injuries while in the employ of the tenant's husband, and twelve days later the husband conveyed the demanded premises to her, and that afterwards the premises were duly sold and conveyed to the demandant upon an execution issued on a judgment recovered by him against the husband. The demandant was then permitted to introduce evidence that, before the conveyance to the tenant, the husband, after being asked to pay the

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demandant the wages due him, was told that the demandant intended to hold him liable for the accident, and therefore declined to give him a receipt in full of all demands. *Held*, that the evidence was competent as bearing upon the alleged fraudulent intent of the husband.

The demandant also introduced evidence that a short time before the verdict in the original action, and after the verdict, and again at the time of the levy, his attorney made a search for real and personal property belonging to the husband without finding any. *Held*, that it could not be said that the evidence was improperly admitted.

WRIT OF ENTRY, dated November 17, 1890, brought under the Pub. Sts. c. 172, § 49, to recover two parcels of land in Worcester, as standing fraudulently in the name of the tenant. At the trial in the Superior Court, before *Aldrich*, J., it appeared in evidence that the demandant sustained personal injuries by the fall of a derrick on December 7, 1888, while in the employ of Thomas Daniels, the tenant's husband; that on December 19, 1888, Thomas Daniels conveyed the premises in question through a third person to the tenant, the consideration recited being "one dollar and other good and valuable considerations"; that on March 26, 1889, the demandant began an action of tort against Thomas Daniels, attaching all the real estate standing in his name, and recovered a verdict against him for $5,000, on April 12, 1890; that on the day last named the demanded premises were attached upon a special precept as standing fraudulently in the name of the tenant; and that on May 7, 1890, an execution, duly issued on the judgment entered for the demandant, was duly levied on these premises, and they were then sold to the demandant for $1,500, and duly conveyed to him by the officer, the execution being returned unsatisfied for $3,623.47.

One La Motte was allowed, against the tenant's objection, to testify that, a week or a week and a half after the accident to the demandant, he went to Thomas Daniels to collect wages claimed to be due the demandant; that Daniels told him he would pay if the demandant would give him a receipt in full of all demands; and that, after seeing the demandant, he returned to Daniels the next day, and told him that the demandant declined to give such a receipt, as he intended to hold him liable for the accident; and the tenant excepted.

Charles M. Rice, one of the demandant's attorneys, was also

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allowed, against the tenant's objection, to testify that he made search "probably not more than a month or two before" the verdict in the original action, and again after the verdict in that action, and again about the time of the levy, for real and personal property of Thomas Daniels, but could not find any; and the tenant excepted.

The jury returned a verdict for the demandant; and the tenant alleged exceptions.

F. P. Goulding, for the tenant.

C. M. Rice, (*W. W. Rice* with him,) for the demandant.

ALLEN, J. The only questions argued relate to the admission of evidence.

1. The testimony of La Motte was competent. The demandant's claim against Thomas Daniels arose out of an accident to the demandant, which occurred December 7, 1888. Twelve days afterwards Daniels made to his wife, through a third person, the conveyances which are sought to be avoided as being in fraud of the demandant's rights. La Motte's testimony was, that a week or a week and a half after the accident he sought to collect from Daniels the sum due to the demandant for wages, and that on the following day he told Daniels that the demandant intended to hold him liable for the accident, and therefore declined to give him a receipt in full of all demands. Taking it at the longest, that statement to Daniels that the demandant intended to hold him liable for the accident must, according to the testimony, have preceded the conveyances; and it was clearly competent, as bearing upon the alleged fraudulent intent of Daniels.

2. We cannot say that there was any error in law in admitting the testimony of Mr. Rice. The fact that Daniels had no other property at the time of making the conveyances, if it could be proved, would obviously be of some significance. *Bristol County Savings Bank* v. *Keavy*, 128 Mass. 298, 303. Evidence that at some previous time he had no other property would clearly be competent, if there was nothing to show a change in this respect. *Cozzens* v. *Holt*, 136 Mass. 237. But his condition as to property at a subsequent time would also have some tendency to show his condition at the time of the conveyances, provided it was not too remote. Where the mental condition of a testator at the time of making his will is to be determined, we

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have recently held that acts and declarations several months afterwards might be put in evidence, under special circumstances. See *Lane* v. *Moore*, 151 Mass. 87, and cases there cited. Similar reasons apply to the question of one's pecuniary condition. It is for the presiding judge to determine, in the first instance, whether the circumstances and the length of time are such as to render the evidence of no value, and very much is necessarily and properly left to his discretion. *Commonwealth* v. *Pomeroy*, 117 Mass. 143, 148. *Lane* v. *Moore*, *ubi supra*. In the present case, it is true, the time when Mr. Rice made his search for property may have been from fifteen to seventeen months after the date of the conveyances, but it also appeared that the demandant had sued Daniels by a writ dated March 26, 1889, which was about three months after the conveyances, and an attachment of real estate was returned, which would certainly have a tendency to keep things *in statu quo* as to real estate at least. Moreover, the officer's return on the execution in favor of the plaintiff was in the case, and it showed a levy on no property except the demanded premises, and the execution was returned unsatisfied for $3,623.47. From this, in the absence of any explanation, it might reasonably be inferred that Daniels had made no conveyance of real estate since the attachment was returned upon the original writ. With this evidence that the condition of things had not changed since a time so near the date of the conveyances, it certainly was within the discretion of the presiding judge to admit the testimony of Mr. Rice. *Commonwealth* v. *Drew*, 153 Mass. 588.

This mode of proving that a person had no visible property at a particular time has been held proper in *Clark* v. *Chamberlain*, 13 Allen, 257, 261.

Exceptions overruled.

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COMMONWEALTH *vs.* HENRY GOODNOW.

Worcester. September 28, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Intoxicating Liquors — Evidence — Contradiction of Witness.

The admission of a question put to a defendant in a criminal case, respecting a fact which his counsel in his opening admits and which the defendant's reply so far as responsive denies, affords him no ground of exception.

At the trial of a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, a witness who, according to the testimony, was found in an intoxicated condition on the defendant's premises just before the complaint was made, denied that fact, and further testified that he had not drunk intoxicating liquor for the past two years. *Held*, that he might be contradicted by evidence tending to show that he had been intoxicated repeatedly during that time.

COMPLAINT, for keeping intoxicating liquors with intent unlawfully to sell the same. At the trial in the Superior Court, before *Thompson*, J., it appeared that the defendant had kept a hotel in the city of Worcester for four years prior to the date of the complaint, and that he had previously kept a hotel in the town of Shrewsbury. The defendant's attorney, in opening the defence to the jury, stated that the defendant used to be engaged in the business of liquor keeping, and was convicted of the same, but that when he moved to his present quarters he gave it up. The defendant testified in his own behalf, and was asked, on cross-examination, "Did you not sell intoxicating liquor at your hotel in the town of Shrewsbury four or five years ago?" The judge admitted the question, and the defendant answered that he had not sold it himself, but that his wife and mother in law, who lived with him, sold it at his place, and that he knew that they were so selling; and the defendant excepted.

The government offered evidence that, when the officers searched the defendant's premises, just prior to the making of this complaint, there were several persons in the bar-room in an intoxicated condition, among whom was one Carr. Upon being called as a witness by the defendant, Carr denied that he was intoxicated at the time, and further stated that he had not drunk intoxicating liquor for the past two years. One Fay, a

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government witness, after testifying that he had worked for several years in the same shop with Carr, was asked by the District Attorney, "What have been Carr's habits for the past two years as to the use of intoxicating liquors?" The judge admitted the question, against the defendant's objection, and Fay replied that Carr had often been in a state of intoxication for a week at a time.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

H. C. Hartwell & C. R. Johnson, for the defendant.

A. E. Pillsbury, Attorney General, for the Commonwealth.

HOLMES, J. 1. The admission of the first question did the defendant no harm, as his counsel had admitted the fact in his opening, and as the defendant's answer, so far as responsive, denied it.

2. Carr's denial that he had drunk intoxicating liquor for the past two years went to support his denial that he was drunk at the time in question, and indeed would seem to have been the form in which the latter denial was put. Therefore it was subject to contradiction. See *Riddell* v. *Thayer*, 127 Mass. 487, 489.

Exceptions overruled.

CHARLES F. LYON *vs.* VERNON PROUTY.

Worcester. September 29, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Practice — Exceptions — Evidence — Conversations between Husband and Wife.

Questions upon which no ruling is asked or exception taken at a trial cannot be considered upon a defendant's bill of exceptions, unless it appears, upon the conceded facts, that there is an objection to the plaintiff's recovery which cannot be removed by further proof, or unless it appears that from a mistake or a misapprehension or misapplication of legal principles the case has resulted in a mistrial.

A conversation between husband and wife in the presence of their daughter, fourteen years old, concerning a matter in which she naturally would be interested and which would be likely to attract her attention, was *held* to be rightly admitted in evidence.

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TORT, for seducing the plaintiff's wife. Answer, a general denial. At the trial in the Superior Court, before *Staples*, J., there was evidence that from April, 1883, to April, 1885, the plaintiff and his wife were in the defendant's employ, he as a farm laborer and she as housekeeper; that during that time the plaintiff witnessed various acts of familiarity between his wife and the defendant, but said nothing to the defendant about them; that in May, 1885, the plaintiff left the defendant's employ, assigning as a reason that the defendant had stepped between him and his wife; that in the June following he came to the defendant's house and saw him, and was paid by him his wages; that he then left the defendant's house, leaving his wife there, but taking his daughter, who was then fourteen years of age, with him, and a part of his household goods; that subsequently he sent his daughter back to the defendant's to board, and she remained there with her mother; that thenceforward he had no communication with his wife until the trial; and that the plaintiff's wife was delivered of a child at the defendant's house in October, 1889, and the defendant continued to pay her for her services during the entire time, and from and after her confinement paid the daughter for her services.

The plaintiff was permitted to testify, against the defendant's objection, that when he returned to the defendant's house in June, 1885, he was with his wife in a room adjoining that in which the defendant was, and that, in the presence of his daughter, he then asked his wife to go away with him, but she refused.

The defendant asked the judge to rule, among other things, that, "if the husband and wife were living in a state of separation, the action cannot be maintained because of criminal connection alone"; but the judge refused so to rule, and submitted the case to the jury.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

T. G. Kent, (*A. W. Curtis* with him,) for the defendant.

W. S. B. Hopkins, for the plaintiff.

MORTON, J. The defendant contends that the evidence relating to the conversation between the plaintiff and his wife should have been excluded, and that the plaintiff connived at

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the intercourse between the defendant and the plaintiff's wife, and cannot now recover damages for such intercourse. We do not understand him to rely upon any other grounds for setting aside the verdict. The exception taken to the refusal of the court to rule, as requested by the defendant, that, if the husband and wife were living in a state of separation, the action could not be maintained because of criminal connection alone, has not been argued to us, and we therefore treat it as waived.

1. The answer was merely a general denial. It did not set up connivance. The attention of the court does not appear to have been called during the trial to that ground of defence. No instructions or rulings were asked or exceptions taken concerning it, and the trial appears to have proceeded on wholly different grounds. Even if the question of connivance was open to the defendant under the general denial contained in the answer, it was not raised; and it is well settled that questions upon which no ruling was asked or exception taken at the trial cannot be considered upon a defendant's bill of exceptions, unless it appears, upon the conceded facts, that there is an objection to the plaintiff's recovery which cannot be removed by further proof, or unless it appears that, from a mistake, or misapprehension, or misapplication of legal principles, the case has resulted in a mistrial. *Slater* v. *Rawson*, 1 Met. 450. *Bond* v. *Bond*, 7 Allen, 1. *Draper* v. *Saxton*, 118 Mass. 427. *Goodnow* v. *Hill*, 125 Mass. 587. This case does not come within either of these exceptions.

2. The circumstances surrounding the conversation between the plaintiff and his wife are not very fully disclosed. It does not appear whether the door was open or shut between the room where the plaintiff and his wife and daughter were, and the adjoining room in which the defendant was, nor in what part of the adjoining room the defendant was. For aught that appears, the door might have been opened, and the defendant might have been where he could readily hear what was said by the plaintiff to his wife. In view of what had passed previously between the plaintiff and himself, and the occasion of the plaintiff's being there at that time, and of his going away, this would seem to be not improbable. It does appear, however, that the conversation took place in the presence of the plaintiff's daughter, then a girl of fourteen. The conversation

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does not seem to have been of such a character that she could not have heard it. Nothing shows that she would not have been competent as a witness to it. The subject of it was a matter in which she naturally would be interested, and which naturally would attract her attention. There is nothing to show that she was not attending to it. The case differs widely from *Jacobs* v. *Hesler*, 113 Mass. 157, and we think the testimony was rightly admitted. We do not understand that conversations between husband and wife in the presence and hearing of a third party are to be excluded because confidential. Nothing in this case shows, however, that the conversation was confidential.

Exceptions overruled.

GEORGE DANA *vs.* ANNA T. DANA & others.

Worcester. September 29, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Equity — Resulting Trust — Presumption.

The grantee of land bargained therefor and determined the form of conveyance, but payment was to be and was in fact made in brick manufactured by and belonging to his father, who took possession and received the rents and profits during his lifetime. The evident purpose of the purchase was to use the land in connection with the father's adjoining farm and brick-yard, and it was so used by him, and, after his death intestate, by the grantee and his brother as copartners. *Held*, that after the grantee's death his brother might maintain a bill in equity to establish a resulting trust in favor of the father in the granted premises, and to compel the conveyance to him of his share of the land.

BILL IN EQUITY, filed in the Superior Court, by George Dana, as an heir of Ebenezer Dana, against the only daughter of the other heir, his brother E. Beaman Dana, deceased intestate, and her guardian, and the administrator of his brother's estate, to establish a resulting trust in favor of Ebenezer Dana in land conveyed to E. Beaman Dana. The Superior Court entered a decree establishing the trust; and the defendants appealed to this court. The material facts appear in the opinion.

C. A. Merrill, for the defendants.

H. L. Parker, for the plaintiff.

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HOLMES, J. This is a bill to establish a resulting trust in land conveyed to the first named defendant's ancestor, E. Beaman Dana, and to compel a conveyance. The Superior Court made a decree for the plaintiff; and the defendants appealed. The facts, as found by the master and shown by the evidence reported by him, are that the purchase was made by E. Beaman Dana, to be paid for, and paid for in fact, in brick manufactured by and belonging to E. Beaman Dana's father, Ebenezer Dana. The evident purpose of the purchase was to use the place in connection with the adjoining farm and brick-yard owned by Ebenezer Dana. It was used in that manner by Ebenezer Dana during his lifetime, and after his death by his two sons, E. Beaman Dana and the plaintiff. The question presented is simply a question of fact, whether enough appears to rebut the presumption of a resulting trust in favor of the party who furnished the purchase money. The fact relied on is that the party who paid was the father of the grantee; but this is met by the facts that, so far as appears, the grantee, not his father, determined the form of the conveyance, as the grantee made the bargain, and that the father subsequently during his lifetime kept possession, and took the rents and profits. We cannot say that the finding of the Superior Court was wrong. *Decree affirmed.*

MARY DEW. FREELAND *vs.* EDWARD WRIGHT.

Worcester. September 29, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Equity Practice — Master — Exceptions — Issues to Jury — Waiver.

Exceptions will not lie to the findings of a master in matters of fact without a report of the evidence.

After the filing of a master's report, and a recommittal of the case to him for a fuller report thereof, it is within the discretion of the court to order him to report the evidence; and an order of the court refusing to do so will not be disturbed in the absence of anything to show that the discretion was wrongly exercised.

Any right which a party to a suit in equity may have to go to a jury is waived by his allowing a reference to and a hearing before a master.

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Upon an appeal from a final decree in equity, where there is a master's report and no report of the evidence, the only question open is whether the decree is warranted by the pleadings and by the findings of the master.

BILL IN EQUITY, filed in the Superior Court, to redeem a parcel of land in Sutton from a mortgage. The case was referred to a master, and, upon the coming in of his report, the Superior Court made a decree that the plaintiff should have possession of the land upon payment of a certain sum to the defendant; and the plaintiff, being dissatisfied therewith, appealed to this court. The case, so far as material to the points decided, appears in the opinion.

M. M. Taylor, for the plaintiff.

W. B. Harding, for the defendant.

KNOWLTON, J. This is a bill in equity, brought to redeem a mortgage of real estate. The plaintiff filed exceptions to the master's report, and then moved that the master be required to report all the evidence taken at the hearing, and appealed from the order of the court denying the motion. She afterwards asked that issues be framed for a jury, and appealed from the refusal of the court to frame issues, and finally took an appeal from the final decree.

1. The exceptions to the master's report present no question of law; they all relate to findings of fact which cannot be revised without a report of the evidence. *Nichols* v. *Ela*, 124 Mass. 333.

2. The rule to the master did not require him to report any part of the evidence, and there is nothing to show that the parties were not content at the outset with the form in which the order was made. Whether the master should afterwards be ordered to report the evidence, or any part of it, was discretionary with the court. *Atlanta Mills* v. *Mason*, 120 Mass. 244. *Nichols* v. *Ela*, 124 Mass. 333. The court recommitted the case to the master, that he might report more particularly the facts bearing on the principal matter in issue, and there is nothing to indicate that the court did not wisely exercise its discretion in refusing to require him at that stage of the proceedings to report the evidence.

3. If an application to frame issues for a jury would have been granted, if seasonably made, the plaintiff waived her right

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by allowing a reference to a master and a hearing before him, before asking for a trial by jury. *Parker* v. *Nickerson*, 137 Mass. 487. It would be unreasonable to permit a party to go to trial before a master, and take his chances of a favorable report, and then, if dissatisfied with the result, have another trial before a jury, and thereby put the other party to unnecessary expense and trouble.

4. On an appeal from a final decree, where there is a master's report and no report of the evidence, the only question open is whether the decree is warranted by the allegations of the bill and answer, and by the findings of the master. On this point there can be no doubt in the case at bar. The decree follows the pleadings and the master's report. We see no error in any part of the record. *Decree affirmed.*

GEORGE S. HOWE *vs.* MARY W. DICKINSON & others.
WILLIAM H. JOURDAN & others *vs.* SAME.
WILLIAM H. CRAWFORD & another *vs.* SAME.
SAMUEL E. HULL *vs.* SAME.
CYRUS G. WOOD *vs.* SAME.
CITIZENS' NATIONAL BANK *vs.* SAME.

Worcester. September 30, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Executor — Carrying on Business — Personal Liability — Opening to Jury.

In actions of contract seeking to charge the defendants personally for goods purporting to be sold to the W. F. Co., and upon notes signed with that name, the plaintiffs' counsel in his opening stated that W. D., whose executors and residuary legatees the defendants were, formerly did business alone under that name, and gave and indorsed notes signed "W. F. Co., S. F. D., Treasurer," by his son and manager S. F. D., who was called the "Treasurer"; that after his death the business went on without a break in the same way as before, and the notes were in the same form except that they were indorsed by S. F. D., who continued to be treasurer and manager; that the contracts sued on were made since W. D.'s death; that the business debts outstanding at W. D.'s death were paid out of the same; and that all these facts except the last were known to the plaintiffs. The counsel then added, that the plaintiffs were aware that the defendants'

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evidence would tend to prove that, by agreement of the executors, S. F. D. took the business, assuming the liabilities and taking the assets, and carried it on as his own; that this evidence the plaintiffs might not be able to control, but did not admit; and that they claimed the right to hold the defendants on the facts stated, unaffected by such private arrangement. *Held*, that the counsel's reference to the defendants' case did not import an admission of the facts referred to, and that the plaintiffs were entitled to go to the jury.

SIX ACTIONS of contract for goods sold and upon promissory notes. The defendants were described in the several writs as "executors of the last will and testament of William Dickinson, late of said Worcester, deceased, carrying on the business as the Worcester Felting Company which the said William Dickinson at the time of his decease was carrying on in the same name." The cases were tried together in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiffs' counsel, in his opening to the jury, stated that the plaintiffs would show that "the Worcester Felting Company," before the death of William Dickinson of Worcester, who died September 6, 1887, was the name under which he carried on a private manufacturing business of which he was the sole proprietor; that Samuel F. Dickinson, his oldest son, was in the employ of his father, and was to a great extent in charge of the manufacturing business, and was called the "Treasurer"; that purchases of stock were quite uniformly paid for by notes on six months' time, which were signed "Worcester Felting Co., S. F. Dickinson, Treasurer," and were indorsed by William Dickinson; that William Dickinson, who was a man of large property, and at the time of his death left a large amount of this paper outstanding, by his will appointed his wife, who was the first named defendant, his daughter, and his two sons, one of whom was Samuel F. Dickinson, as his executors, and in the fifth item gave the residue of his estate to these four in equal parts, requesting therein that such residue should be divided and paid over within two years of his decease, so far as the same could be collected; that all the executors named in the will were duly qualified; that the business of manufacturing at the Felting Company's mill went on after the death of William Dickinson in the same name, and the payments for purchases with six months' paper was continued, the only change being

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that after his death the paper, which was still signed "Worcester Felting Company, S. F. Dickinson, Treasurer," was indorsed by Samuel F. Dickinson; that the whole outstanding indebtedness of the business at the time of William Dickinson's death was taken care of and paid out of the business, as it was carried on; that each of the plaintiffs in these actions had dealt with the Worcester Felting Company in William Dickinson's lifetime, and knew that he was the sole proprietor of the business, had knowledge of his death, and of the contents of his will, knew who were the executors thereof, and that the same person who had managed the business theretofore, Samuel F. Dickinson, who was an executor, continued to conduct and manage the business; and that each plaintiff sold the goods in question, and the plaintiff in the sixth case discounted a note on which its action was based, on the credit of William Dickinson's estate, and in the belief that the property of William Dickinson, either in the hands of his executors, or his devisees and legatees, who were the same persons, was holden.

The plaintiffs' opening concluded as follows: "The plaintiffs are now made aware what the testimony of the defendants will tend to prove, that the four executors, constituting the whole family and all the devisees and legatees, met and verbally agreed that Samuel F. Dickinson should take the felting business, assuming the liabilities and taking the assets, and carrying it on as his own, and that he did so; and that subsequently the personal property of the estate of William Dickinson was divided between them. This evidence the plaintiffs may not be able to control, but do not admit. No notice of any such arrangement was ever given publicly, nor did these plaintiffs have any knowledge or individual notice thereof, and the plaintiffs claim that their rights are therefore unaffected by such private arrangement, and they claim to hold the defendants as holding themselves out on the facts stated above, not otherwise, to be the persons conducting the said business, if not as executors winding up William Dickinson's estate, then as individuals owning the property employed in the business and carrying it on, by one of their number, either as partners or joint owners."

The judge ruled upon this opening, considered as an offer of proof, that the actions could not be maintained, and ordered a

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verdict in each case for the defendants; and the plaintiffs alleged exceptions.

W. S. B. Hopkins & B. W. Potter, (*F. B. Smith* with them,) for the plaintiffs.

G. F. Hoar & W. W. Rice, (*E. B. Stoddard & T. H. Gage* with them,) for the defendants.

HOLMES, J. These are actions seeking to charge the defendants personally for goods which purported to be sold to the Worcester Felting Company, and upon notes signed with that name. The case was taken from the jury on the plaintiffs' opening, which shortly stated, was as follows. Formerly "the Worcester Felting Company" was the name under which William Dickinson did a manufacturing business alone. He gave notes signed "Worcester Felting Company, S. F. Dickinson, Treasurer," and indorsed by himself, William Dickinson. He is dead, and the contracts sued upon were made since his death. The defendants are his executors and residuary devisees and legatees. The business went on without a break, in the same way as before, and the notes were in the same form, except that now they were indorsed by Samuel F. Dickinson, one of the defendants, who was treasurer and manager both before and after his father's death. The whole indebtedness of the business outstanding at William Dickinson's death was paid out of the business. All these facts except the last were known to the plaintiffs.

Had the opening stopped here, it would have presented a case for the jury. The use of the trade name and good will, which were assets of the estate, and the payment of the old debts, for which the defendants were liable as executors, were sufficient to warrant the inference that the defendants were carrying on their testator's business, and did actually contract with the plaintiffs under the name of the Felting Company, in which case, of course, they would be bound personally.

The plaintiffs' counsel, however, went on to state that they were made aware that the defendants' testimony would tend to prove that, by agreement of the four executors, Samuel F. Dickinson took the felting business, assuming the liabilities and taking the assets, and carrying it on as his own. This evidence, he said, they might not be able to control, but did not admit, and went

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on to say that they claimed the right to hold the defendants on the facts stated, unaffected by such private arrangement. The latter claim, on which no doubt the emphasis was laid, we do not perceive the justification for on the facts as we understand them. And we think it probable that this led the judge below to understand the plaintiffs as making a protesting admission that the business was in fact carried on by Samuel F. Dickinson alone. We cannot so interpret the spoken words, however. We must take them as reserving all rights, including the *spes* or possibility of their being able to upset the defendants' story on cross-examination. If so, the plaintiffs had a right to go to the jury on the ground above stated.

Exceptions sustained.

ALICE M. FAY *vs.* BENJAMIN S. VANDERFORD.

Worcester. September 30, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Probate Appeal — Framing of Issues for Jury — Discharging Issue after Verdict.

In probate cases the framing of issues for a jury in this court rests in the discretion of the presiding justice; and his decision discharging an issue after a trial thereon before him will not be disturbed, in the absence of anything to show that he was wrong.

APPEAL, by Alice M. Fay, from a decree of the Probate Court that the omission of her father, Frederick C. Vanderford, to provide for her in his will was intentional, and was not occasioned by accident or mistake. At the trial in this court, before *Holmes*, J., upon the issue framed and submitted to a jury, whether such omission to provide for the appellant was intentional or whether it was occasioned by accident or mistake, the jury answered that it was not intentional. Thereupon the respondent moved that this finding of the jury be set aside, and the issue be discharged. The judge allowed the motion, stating

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his reasons therefor in the following memorandum: "In this case, I set aside the verdict, and discharged the issue, on the ground that, having heard the evidence, I thought that it was difficult, if not impossible, for a jury to confine their consideration to those aspects of it which were legitimate to the issue. But I made the order without further prejudice than this statement of my reasons may cause the appellant on a renewed application." From this ruling, Alice M. Fay appealed to the full court.

H. C. Hartwell, for the appellant.

W. S. B. Hopkins, for the respondent.

ALLEN, J. The presiding justice framed an issue for the jury, and after trial and verdict he set the verdict aside and discharged the issue. There was a memorandum stating the reason, but the petitioner, having appealed from the order discharging the issue, objects that the memorandum is no part of the record, and ought not to be considered. We therefore lay that aside. The petitioner certainly was not entitled to a trial by jury as a matter of right. The exercise of discretion in discharging the issue, or in refusing on application seasonably made to frame an issue, is reviewable by the full court. But we have not before us the means of saying that the presiding justice was wrong. The framing of issues for a jury in probate cases is by no means a matter of course; but it is to be granted or refused, in each particular case, in the discretion of the presiding justice. In the present case there was a trial, so that the presiding justice was familiar with the facts; and in the absence of anything to show that he was wrong, his decision must stand. *Ross* v. *New England Ins. Co.* 120 Mass. 113, 117. *Newell* v. *Homer*, 120 Mass. 277, 281.

Decree affirmed.

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REBEKAH SIMONDS *vs.* MARY J. PATRIDGE.

Worcester. October 1, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Services — Accord and Satisfaction — Evidence.

On the issue whether personal services rendered a testator in his lifetime were paid for by a gift in his will, one of the attesting witnesses testified that he was present when the will was "made," and had an "impression" that the plaintiff was also present, and that the testator then said that such services were to be paid for in that way; another attesting witness testified that she was present when the will was "executed," and the testator expressed himself in the same way, but that the plaintiff was not present. *Held*, on a bill of exceptions alleged by the plaintiff, that the testimony of each witness must be taken to refer to the same conversation, and was admissible; and that a ruling that there was no evidence of satisfaction of the plaintiff's claim was properly refused.

CONTRACT, against the administratrix with the will annexed of the estate of George Patridge, to recover $810 for personal services rendered by the plaintiff to the testator as a housekeeper. The answer contained a general denial, and set up an accord and satisfaction by a gift to the plaintiff in the testator's will.

At the trial in the Superior Court, before *Staples*, J., there was evidence that the plaintiff rendered the services in question to the testator from March, 1883, to the date of the testator's death, on August 12, 1886, receiving from him in his lifetime no pay therefor beyond two small sums of money; that the testator, by his will, which was dated August 6, 1886, and of which Dr. Charles H. Davis and Sarah A. Williams were two of the attesting witnesses, gave to the plaintiff certain real estate, which she had sold for $8,000; and that the plaintiff knew before the testator's death that he intended to give her this real estate in his will.

The defendant called Dr. Davis, who testified that he "was present when George Patridge's will was made," and, against the plaintiff's objection, was permitted to testify that the said George, when the will was being written, said that he wanted the plaintiff to have the house, because she had always been kind to him and faithful, and done the right thing for him,

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and that would be in compensation for what she had done. He did not remember that the plaintiff was in the room when this was said, but had the "impression" that she was; that she was about the house, in the room or near it.

Sarah A. Williams, called by the defendant, was permitted to testify, against the plaintiff's objection, that she "was present when George Patridge executed his will"; that the plaintiff was not present; that Micajah, his brother, said to George, "You want to leave the house to Rebekah, because she has done so much for you?" and George nodded his head, and mumbled, "Yes."

The judge refused to rule, as requested by the plaintiff, that there was no evidence of satisfaction of the plaintiff's claim, and instructed the jury that, if it was understood and intended by and between the plaintiff and George Patridge that the provision made for her in the will should be and should operate as compensation for her services, and the same was so accepted by her when the will became effectual, then she cannot now claim any further compensation; and that the evidence of Dr. Davis was not competent, upon the question of an agreement between George Patridge and the plaintiff, if they should find that the plaintiff was not present at the time of the conversation recalled by him.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

F. A. Gaskill & H. F. Harris, for the plaintiff.

W. S. B. Hopkins & F. J. Barnard, for the defendant.

HOLMES, J. This is an action for services as housekeeper to the defendant's testator. The answer is a general denial, and accord and satisfaction by a devise and legacy in the testator's will. If a conversation took place between the testator and a third person in the presence of the plaintiff, to the effect that her services were to be paid for in that way, it would be admissible to prove the fact. *Frost* v. *Sumner*, 149 Mass. 98. The testimony of Dr. Davis was open to the interpretation that, although his memory of the plaintiff's presence at the conversation which he related was not visual, it still was memory of a fainter degree, sufficient for belief. So interpreted, it warranted a finding that she was present. *Stockbridge* v. *West Stockbridge*, 12 Mass. 400. The jury were instructed that Dr. Davis's evidence was not competent, if they should find that the plaintiff

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was not present at the conversation testified to by him. This being the presiding justice's view of the law, expressly stated to the jury, it is quite incredible that he should have applied a contradictory rule the next moment to the testimony of Sarah Williams; and we are compelled to require with some strictness that the excepting party should make it clear that the testimony was admitted improperly.

The bill of exceptions does not exclude the possibility, and some of us think that it shows affirmatively, that the conversation testified to by Williams was the same as that testified to by Dr. Davis; so that the evidence and instructions as to the plaintiff's presence applied to it also.

Dr. Davis and Williams both were witnesses to the will. The occasion described by the former was when the will was made, by the latter, when Patridge executed his will. There is nothing in the two accounts of what was said inconsistent with its being the same conversation. Evidently the judge assumed that both witnesses were speaking of the same conversation, and, although the bill of exceptions suggests the possibility that they were not doing so, it does not show the fact to have been that way rather than the other. Upon this view of the evidence, without going further, it was admissible, and the ruling requested, that there was no evidence of satisfaction of the plaintiff's claim, was properly refused. *Exceptions overruled.*

DRAYTON HILLYER & others *vs.* MARY W. DICKINSON & another.

Worcester. October 1, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Promissory Note — Fraudulent Representations — Burden of Proof — Evidence.

A party having the burden of proof cannot retain a verdict in his favor by pointing to a mere scintilla of evidence, when, upon an examination of the whole case, the court does not find substantial evidence to support it; and the court, if it can find no evidence entitled to be weighed, must say so, and the jury should be instructed that the burden of proof is not supported.

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In an action upon a promissory note, on the issue whether the defendant introduced any evidence proper to be submitted to the jury, to support an averment in his answer that the note was procured by the plaintiff's misrepresentations and fraud, it was *held*, upon a report of all the material evidence in the case contained in a bill of exceptions, that there was no evidence for the jury that the plaintiff made such representations except upon information from a third person; and that the jury should have been so instructed.

CONTRACT, brought by Drayton Hillyer, Henry C. Dwight, and William C. Skinner, doing business as Dwight, Skinner, and Company, upon a promissory note for $32,150.46, dated March 26, 1889, payable to the order of that firm and signed by the defendants, Mary W. Dickinson and George Stuart Dickinson. At the trial in the Superior Court, before *Aldrich*, J., the defences relied on were, (1) that the defendants were induced to give the note by the fraudulent representations of the plaintiffs that the indebtedness of Samuel F. Dickinson, the son and brother of the defendants respectively, who was in financial straits, was insignificant beyond what was due to their firm and covered by the note, and that the giving of the note by the defendants would substantially relieve him from his embarrassment and enable him easily to resume business, whereas Samuel F. Dickinson at the time owed from $65,000 to $75,000, and was hopelessly insolvent; (2) that the plaintiffs at the same time, and as part of the same transaction, promised to take back certain wool sold by them to Samuel F. Dickinson for use in his business, which was still on hand and unmanufactured, and thereby reduce the amount which would be due to their firm from the defendants upon the note, but that the plaintiffs did not intend to take back such wool, and intended at the time not to fulfil their promise.

The judge refused to rule, as requested by the plaintiffs, that there was no evidence for the jury upon these issues, and submitted the case to them.

The jury returned a verdict for the defendants, based upon the first issue; and the plaintiff alleged exceptions. The nature of the evidence appears in the opinion.

F. P. Goulding & W. S. B. Hopkins, for the plaintiffs.

G. F. Hoar, (*E. B. Stoddard* with him,) for the defendants.

ALLEN, J. The view no longer prevails that a party who has the burden of proof can retain a verdict in his favor by pointing to a mere scintilla of evidence, when, on an examina-

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tion of the whole case, the court can find no substantial evidence to support it. It is not necessary, perhaps not possible, to lay down a precise formula of general application by which to determine whether the evidence in particular cases is sufficient or not. Where there is evidence proper to be weighed, the jury is the proper tribunal to weigh it, subject nevertheless to the power in the court to set the verdict aside as against the weight of evidence. But where the court can find no evidence which, in its deliberate and ultimate judgment, is entitled to be weighed, it must say so, and the jury should be instructed in terms that there is no evidence to support the burden of proof which rests upon the party. Evidence which merely raises a suspicion, or a surmise, or a conjecture, is not enough to be entitled to be submitted to the jury. *Chase* v. *Breed*, 5 Gray, 440. *Fay* v. *Alliance Ins. Co.* 16 Gray, 455, 461. *Denny* v. *Williams*, 5 Allen, 1. *Commonwealth* v. *Fitchburg Railroad*, 10 Allen, 189. *Butterfield* v. *Western Railroad*, 10 Allen, 532. *Brightman* v. *Eddy*, 97 Mass. 478, 481. *Markey* v. *Mutual Benefit Ins. Co.* 103 Mass. 78, 87. *Brooks* v. *Somerville*, 106 Mass. 271, 275. *King* v. *Nichols*, 138 Mass. 18. *Carter* v. *Goff*, 141 Mass. 123. *McCreary* v. *Boston & Maine Railroad*, 153 Mass. 300.

The question whether there is evidence which should properly be submitted to the jury is sometimes a very nice one, since the court is not at that stage of the proceedings to pass upon the weight of the evidence, but only to determine whether there is any evidence sufficient to go to the jury. *Forsyth* v. *Hooper*, 11 Allen, 419. *Smith* v. *Collins*, 115 Mass. 388, 398. *Heywood* v. *Stiles*, 124 Mass. 275. *Coolidge* v. *Smith*, 129 Mass. 554. *Lawless* v. *Connecticut River Railroad*, 136 Mass. 1.

In the present case, we have been called on to consider whether the defendants introduced any evidence, proper to be submitted to the jury, to support their averment that the note in suit was procured by misrepresentations and fraud in respect to the amount of the indebtedness of Samuel F. Dickinson; or whether they introduced any such evidence of fraud on the part of the plaintiffs in promising to take back the wool which they had sold to Dickinson, and which still remained on hand as a part of his property. It is conceded that the burden of proof was on the defendants.

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On both of these points, the whole of the material evidence is reported in the bill of exceptions, and an examination of it has led us to the conclusion that the plaintiffs were entitled to the instructions which they requested, that there was no evidence in the case tending to show that they made any representations to the defendants regarding the indebtedness of Dickinson, except upon information; and also, that there was error in submitting to the jury any question of fraud on the part of the plaintiffs in respect to their promise to take back the wool.

The only interviews at which any representations were made were between Mr. Skinner, one of the plaintiffs, and Mr. Kellogg, agent for the plaintiffs, on the one hand, and the defendants on the other hand; Mr. Currier, a friend and witness of the defendants, having also been present at one of the interviews. The material thing to be considered at the trial was whether Skinner and Kellogg made any representations as to the amount of the indebtedness of Samuel F. Dickinson, as of their own knowledge. The jury were instructed, in substance, that if they made positive statements, as of their own knowledge, that his indebtedness did not exceed a certain sum, and if these statements were untrue, and were intended to deceive and did deceive the defendants, who were thereby induced to sign the note, then the fraud would be a defence to the note; but if they made no such statement as of their own knowledge, then this ground of defence would fail.

It is not necessary to repeat here the whole testimony in detail; but that in reference to these representations is as follows.

Mrs. Dickinson, one of the defendants, having testified that at the first interview she met Mr. Kellogg and Mr. Skinner with her son Stuart (the other defendant) by appointment, proceeded to say: "One of the gentlemen had a proposition to make to her. He said that they were her son's largest creditors, and that her son owed them about $32,000, and that he was only owing, as far as they could find out — that Mr. Smith had told them — only five or six thousand more, — might be $40,000 in all. The other creditors were only small creditors, amounting to five or six thousand dollars, in all perhaps it might amount to $40,000, they didn't, Mr. Smith didn't know, — they had no books. . . . The next morning they met by appointment, and Mr. Currier,

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a gentleman related by marriage to the Dickinson family, came in. They repeated before Mr. Currier the same statement, that Samuel F. Dickinson owed them $32,000 for wool, and smaller creditors, which amounted to $5,000 or $6,000 more. Mr. Currier thought it over a minute and said, 'If that is the case, I see no reason why you should not sign that note.' . . . She further testified that she was induced to sign the note in controversy upon their statement of the indebtedness of her son, and that otherwise she should not have signed it.

"In cross-examination, . . . in regard to conversation with Messrs. Skinner and Kellogg at the first interview in the evening, she testified that they said that they were the largest creditors, and that 'they had been to the mill and found how much, as they supposed, he was owing, and that they were the largest creditors.' They said Smith had told them that Samuel F. Dickinson was owing them $32,000 for wool, or a little more. The others were smaller sums. . . . She further testified, in regard to conversation in morning interview, . . . they said Sam was owing about $32,000; he was owing other parties only small sums, amounting to five or six thousand, and perhaps it might amount to forty thousand. They said Smith told them; this was as near as they could get it from what Smith told them."

This was all of Mrs. Dickinson's testimony upon the subject. Mr. Smith, above referred to, was employed by Samuel F. Dickinson in his business, to keep the books and to attend to other duties.

George Stuart Dickinson, the other defendant, testified on this subject as follows:

"That he first saw Mr. Kellogg at his mother's house on Monday, March 25, and that Mr. Kellogg stated that Samuel F. Dickinson was indebted to his firm, and proposed that a settlement should be made, and that in consequence of this conversation an appointment was made for that evening. . . . That at the interview in the evening, Mr. Skinner said that, as S. F. Dickinson was not present, he had this proposition to offer: that they were Sam's largest creditors; that Sam owed them about $32,000, and that Mr. Smith had informed them that he was owing only smaller amounts, — owing besides them debts amounting to about five or six thousand dollars. . . . I think Mr. Skinner

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said, as long as they were the largest creditors, and the other creditors were so small, it would not make any trouble at all, and the whole matter could be hushed up. . . .

"In regard to the interview the next morning, at which Mr. Currier was present, he testified that Mr. Skinner repeated his proposition, . . . that he stated indebtedness, — that S. F. Dickinson owed Dwight, Skinner, & Co. [the plaintiffs] to the amount of $32,000, and that Mr. Smith had told him that he only 'owed smaller bills of about five or six thousand dollars besides them, the most amounting to $40,000 only.' He made this statement to Mr. Currier, and Mr. Currier looked over the papers which they had brought. After Mr. Currier looked them over, he said, 'Well, if matters stand as Mr. Skinner represents, it will be the best thing for us to do so, and sign the note and hush the matter up.' . . . Further testified that he was induced to sign the note by the statement that Mr. Currier and Colonel Skinner made in regard to Samuel's indebtedness, and would not otherwise have signed it. . . .

"In cross-examination . . . in regard to the conversation at the preliminary meeting with Mr. Kellogg, in the afternoon of Monday, which resulted in the evening appointment, he testified that Mr. Kellogg said that 'Sam owed a very large amount, — about $50,000'; and he wanted to know if we were willing to assume Sam's indebtedness then, and take his share of the property to cover us. . . . Said that at the evening interview. Mr. Skinner said that 'they were the largest creditors of Sam; they had been to the mill, and Smith had said Sam owed only five or six thousand dollars besides the amount he owed them.' . . . Mrs. Dickinson wanted to know what the other creditors would say, and Mr. Skinner replied that the other creditors were so small, in fact there were no other creditors, as they were so small they would not make any objection, and said we could take care of them easily enough. In regard to the meeting Tuesday morning, he testified that Mr. Skinner repeated his proposition of the night before, and stated that Sam only owed them $32,000, 'and, on authority, only five or six thousand more.'"

Mr. Currier was also called by the defendants, and testified upon this subject as follows, referring to the interview in the morning: "Then I asked Mr. Kellogg if he had looked over

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the books or knew anything what or about the debts of Samuel, what they were. He replied, I think, that he had not looked over the books very particularly, but Mr. Smith had told him the debts were only a few thousand dollars over his indebtedness to them. I said, Will the amount exceed $40,000? and he said he thought not. Then I looked the matter over, and says, 'Well, if the debts don't exceed $40,000, I don't know but it would be a good plan for you to sign this, Mrs. Dickinson.' . . . In his cross examination he again stated that they said that Smith had told them the debts were only a few thousand above theirs."

Mr. Skinner and Mr. Kellogg were witnesses for the plaintiffs, and there was nothing in the testimony of either going to show that they made any representations, as of their own knowledge, as to the indebtedness of Samuel F. Dickinson; indeed, they denied having made any representations at all. But on the bill of exceptions the defendants are entitled to have it assumed that the jury believed the testimony which they introduced. We therefore take the testimony introduced by the defendants, as it stands reported in the bill of exceptions; and we cannot see that on any just construction it purports to assert that Mr. Skinner or Mr. Kellogg made any representations as to the indebtedness of Dickinson to other creditors, as of the personal knowledge of either of them; but, on the other hand, it purports to give statements as to such indebtedness made on the authority of Smith. It is true, the reference to Smith is not repeated in every sentence. But it seems to us that, according to the testimony introduced by the defendants, the references to him were sufficient to show that whatever was said as to indebtedness to other creditors rested on his authority, and that the defendants must have so understood it.

It is urged on behalf of the defendants, that the jury might properly have rejected so much of the testimony of their witnesses as asserted that the statements were made by Skinner and Kellogg on the authority of Smith, and have found that the statements were made on their own authority; but the crucial question as submitted to the jury in the case was, whether they made the statements on their own authority and as of their own knowledge; and upon reading the testimony of the witnesses, it

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seems to us that it not only does not support that theory; it contradicts it.

In respect to the plaintiff's promise to take back the wool, it was left to the jury to determine whether they made that promise intending at the time not to fulfil it. There was no evidence to sustain such a ground of defence. It is not contended in the argument for the defendants that there was; but it is urged that the plaintiffs were not hurt by this proceeding, and that the whole matter has become immaterial because the verdict of the jury rested solely on the first ground. The plaintiffs, on the other hand, contend that it was an injury to them to submit to the jury this question of fraud as though there was evidence to support it, even though the verdict for the defendants was placed on the other ground. Since this question is not likely to arise upon the new trial, it is unnecessary for us to determine it. *Exceptions sustained.*

LEVI L. HAMMOND & another *vs.* COUNTY COMMISSIONERS OF WORCESTER.

Worcester. October 1, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Certiorari — County Commissioners — Discontinuance of Way over Railroad.

The owner of land intersected by a railroad and abutting upon a highway crossing the same, who has no title within the railroad location and whose land at a point very near the highway is connected by a private crossing, is not entitled to maintain a petition for a writ of certiorari to quash the proceedings of county commissioners in discontinuing so much of the highway as crossed the location, although, by reason of the proximity of his house and land to the railroad, he has occasion to use the highway over the railroad oftener than that portion of the public who are farther off.

PETITION, by the owners of a farm in Charlton, for a writ of certiorari to quash the proceedings of the county commissioners of Worcester in discontinuing so much of a highway as crossed the location of the Boston and Albany Railroad. The case was heard by *Holmes*, J., who assumed, for the purposes of the case, that the petitioners were entitled to maintain the petition, but

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found that the petition ought not to be granted because of laches, and reported the case for the consideration of the full court. The case, so far as material to the point decided, appears in the opinion.

H. L. Parker, for the petitioners.

F. P. Goulding, for the respondents.

KNOWLTON, J. The petitioners ask for a writ of certiorari to quash the proceedings of the county commissioners in discontinuing so much of a way as crossed the location of the Boston and Albany Railroad. They owned land abutting on the way on each side of the railroad, but it appears by the allegations of the petition, and by the report, that they had no title to the land within the location abutting on that part of the way which was discontinued. They have a farm crossing over the railroad on their own land, at a point very near the public way, and that is not affected by the doings of the county commissioners. By reason of the proximity of their house and land to the railroad, they had occasion to use the public way over the railroad oftener than that part of the public who are farther off; but their use of it was only as travellers on the road, and was not different in kind, but only in degree, from that of the public generally in that vicinity.

It often happens that some persons are so situated as to derive a very great benefit from a public improvement, while they enjoy and use it no differently from all of the public who use it at all, but they are not for that reason specially taxed for the cost of it; so, too, they may suffer greatly from the abolition or discontinuance of it by the public authorities; but if their suffering does not differ in kind from that of the public generally, they are not entitled to compensation in damages.

The tribunals which lay out and discontinue highways are required by the statutes to adjudicate upon the question what is for the public necessity and convenience; and what is convenient and advantageous to one part of the public may be detrimental to another. In whatever way one may be affected as one of the public by proceedings in regard to highways, he can neither be compelled to pay specially for benefits, nor permitted to receive compensation for damages. This rule, in its application to all the people for a long period of time, generally works substan-

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tial justice, although there may be under it cases of hardship. If the public, or any part of it, are injuriously affected by erroneous action of county commissioners in laying out or discontinuing a way, their remedy must be sought through the Attorney General.

The case at bar is identical in principle with *Davis* v. *County Commissioners*, 153 Mass. 218, and is very similar to it in its facts. In that case, the order of the county commissioners worked a discontinuance of only that part of the way which was within the location of the railroad, and the petitioners were landowners abutting on the way near the crossing, who, by reason of the discontinuance, were obliged to go around a considerable distance to reach the principal street of the city of Northampton, which was on the opposite side of the railroad. But it was held that the inconvenience which they suffered, while greater in degree, was the same in kind as that of all the public who might have occasion to use the way, and that they could not maintain the petition for a writ of certiorari. That case is decisive of the case at bar, and it is unnecessary to consider the other questions raised at the hearing.

Petition dismissed.

CATHARINE S. MILES *vs.* CITY OF WORCESTER.

Worcester. October 2, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

City — Schoolhouse Lot — Encroachment of Wall — Nuisance.

If a city, in adapting a lot of land to schoolhouse purposes, builds and maintains a retaining wall between the lot and land of an adjoining owner, and, by the action of the elements or otherwise, without his fault, the wall comes upon his land and continues there, it becomes a nuisance for which the city is responsible to such owner.

TORT for damages occasioned by the encroachment upon the plaintiff's land of a wall erected between the same and an adjoining lot belonging to the defendant city. Trial in the Superior Court, before *Staples*, J., who allowed a bill of exceptions, which, so far as material to the point decided, was as follows.

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There was evidence that the defendant acquired its land and had always used it for the purposes of a public high school; that about the year 1871 the city built a wall on the south side of its lot between it and the plaintiff's lot, which were then at the same grade, upon a line mutually agreed upon, and proceeded to fill up its land to a level as high as the top of the wall, or even higher; that the wall since it was built had been pressed out of position by reason of the weight of the filling behind it, or by the action of surface water or frost, so that for nearly or quite a foot at the bottom it had bulged out and come upon the plaintiff's land; and that this bulging out of the wall had increased within six years before the date of the writ, and had gradually affected the plaintiff's estate. The jury took a view.

The defendant asked the judge to instruct the jury, (1) that there was no evidence to warrant a verdict for the plaintiff; (2) that the city was not liable for any pressing out of the land under the walls on its south line, whereby the plaintiff's cellar wall may have been caused to bulge or crack; and (3) that, if the city more than six years before the date of the writ built the wall in a negligent manner, and such negligent construction had since caused damage to the plaintiff's premises by the leaning over, or bulging, or lateral pressure of the wall, no recovery for that could be had in this action.

The judge declined to give these instructions, but instructed the jury, in substance, that if the plaintiff by reason of the encroachment of the wall had been kept out of possession and occupation of a part of his land, and if within six years before the date of the writ the city had allowed or suffered the wall to be pushed and crowded upon the plaintiff's land, creating a nuisance thereto, causing him special and peculiar damage, then there was a liability in an action of tort as for a nuisance, no other objection existing to a recovery.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

F. P. Goulding, for the defendant.

W. S. B. Hopkins (*F. B. Smith* with him,) for the plaintiff.

ALLEN, J. It is obvious that the defendant's wall, in its present position upon the plaintiff's land, must be deemed an actionable nuisance, unless the defendant can claim exemption from responsibility on some special ground. *Codman* v. *Evans*,

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7 Allen, 431. *Nichols* v. *Boston*, 98 Mass. 39, 43. *Fay* v. *Prentice*, 1 C. B. 828. The defendant suggests that it is not liable, because the wall was built and maintained solely for the public use, and with the sole view to the general benefit and under the requirement of general laws; and that the case cannot be distinguished in principle from the line of cases beginning with *Hill* v. *Boston*, 122 Mass. 344, and ending with *Howard* v. *Worcester*, 153 Mass. 426. We are not aware, however, that it has ever been held that a private nuisance to property can be justified or excused on that ground. The verdict shows a continuous occupation of the plaintiff's land by the encroachment of the defendant's wall. The question of negligence in the building of the wall is not material. The erection was completed, and was accepted by the defendant, and is now in the defendant's sole charge; and if it is a nuisance, the defendant is responsible. *Staple* v. *Spring*, 10 Mass. 72, 74. *Nichols* v. *Boston*, 98 Mass. 39. Such an occupation of the plaintiff's land cannot be excused for the reasons assigned. A city cannot enlarge its school grounds by taking in the land of an adjoining owner by means of a wall or fence. The public use and the general benefit will not justify such a nuisance to the property of another. If more land is needed, it must be taken in the regular way, and compensation paid, but if, by the action of the elements or otherwise, without the plaintiff's fault, the defendant's wall comes upon the plaintiff's land and continues there, it becomes a nuisance for which the defendant is responsible; and so are the authorities. *Gorham* v. *Gross*, 125 Mass. 232, 239. *Khron* v. *Brock*, 144 Mass. 516. *Eastman* v. *Meredith*, 36 N. H. 284, 296. *Hay* v. *Cohoes Co.* 2 Comst. 159. *Tremain* v. *Cohoes Co.* 2 Comst. 163. *Weet* v. *Brockport*, 16 N. Y. 161, 172, *note*. *St. Peter* v. *Denison*, 58 N. Y. 416, 421. *Mayor & City Council of Cumberland* v. *Willison*, 50 Md. 138. *Harper* v. *Milwaukee*, 30 Wis. 365. *Pumpelly* v. *Green Bay Co.* 13 Wall. 166, 181. Dillon Mun. Corp. § 985.

The case is distinguishable from *Middlesex Co.* v. *McCue*, 149 Mass. 103, where soil from the defendant's land upon a hillside was washed into the plaintiff's mill-pond by the rains, when the defendant had built no artificial structure, and had done nothing more than to cultivate his land in the ordinary way.

Exceptions overruled.

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GEORGE R. WESSON *vs.* WASHBURN CAR WHEEL COMPANY.

Worcester. October 2, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Nuisance — Prescription — Findings of Jury.

In an action for a nuisance, namely, the use and operation of a steam hammer near the plaintiff's house, two questions were put to the jury: first, whether the defendant had acquired a prescriptive right; secondly, whether the hammer was a nuisance; and they were instructed, in addition to certain rulings as to the acquisition of such a right by prescription, that they would have no occasion to consider prescription unless they first found that the hammer was a nuisance entitling the plaintiff to damages. The first question was answered in the affirmative, the second in the negative. *Held*, that the finding that the hammer was not a nuisance made the rulings as to prescription immaterial.

TORT, for a nuisance, namely, the maintenance and use by the defendant corporation of a heavy steam hammer in its works near the plaintiff's house in Worcester. Trial in the Superior Court, before *Staples*, J., who, after a verdict for the defendant, allowed exceptions, which, so far as material to the point decided, appear in the opinion.

W. S. B. Hopkins, (*F. B. Smith* with him,) for the plaintiff.

F. P. Goulding, for the defendant.

HOLMES, J. This case comes before us on exceptions to certain rulings as to the acquisition of a prescriptive right to maintain a steam hammer alleged to be a nuisance. In addition to the instructions complained of, the jury were instructed that they had no occasion to consider prescription, unless they found, first, that the hammer was a nuisance entitling the plaintiff to damages. These two questions were put to them: first, whether the defendant had acquired a prescriptive right; second, whether the hammer was a nuisance. They answered the first, Yes, and the second, No. Of course the answer to the second made the rulings on the first immaterial. It is suggested that the jury were confused by the order of the questions, and otherwise; that in order to find a prescriptive right they must have found that the hammer was a nuisance; and that their answer, No, to the second question, should be taken to mean only that the hammer

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was not a nuisance because the defendant had gained a prescriptive right. We see nothing to warrant us in assuming that the jury were misled in any material respect. If there had been ground for supposing so, no doubt the verdict would have been set aside. It seems to us more reasonable to interpret the answers of the jury as meaning that the hammer was not a nuisance, and that it had been maintained continuously for so long that, if it had been one, the defendant would have acquired a right. So construed, the answer to the second question prevents our considering the law bearing on the first.

Exceptions overruled.

HUGH FRANKLIN *vs.* DELIA M. FRANKLIN.

Worcester. October 2, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Marriage — Consummation — Agreement to live apart — Divorce — Jurisdiction.

The validity of a marriage entered into in regular form is unaffected by a preliminary agreement of the parties not to live together.

The consummation of a marriage by coition is not necessary to its validity.

A husband and wife agreed together before their marriage not to live together, and thereafter separated and never lived together as such. The wife committed adultery, and the husband sought a divorce from her on that ground, having lived in this Commonwealth for the five years next preceding the filing of his libel. *Held*, that the court had jurisdiction of the libel under the Pub. Sts. c. 146, § 5, and that the libellant had not been guilty of such a marital wrong as to prevent him from maintaining the same.

LIBEL, filed by Hugh Franklin, for a divorce from Delia M. Franklin, on the ground of adultery. Hearing in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions alleged by the libellant, as follows:

"The evidence proved that the libellant had had sexual intercourse with the libellee before marriage; that the libellee was pregnant as the result of such intercourse, and the libellant was under arrest, upon a bastardy process instituted by the libellee, at the time of their marriage; that the libellant married the libel-

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lee for the purpose, as he testified, 'to give the child a name,' and to have it born in lawful wedlock, and under an agreement made with the libellee that they should not live together as husband and wife; that immediately after the marriage the parties separated, and had never lived together as husband and wife; that the marriage was performed in this Commonwealth, and the libellant has resided here more than five years next preceding the filing of his libel; that since the marriage the libellee had committed the crime of adultery, as charged in the libel. Upon the foregoing evidence, the court ruled that the libel could not be maintained, and dismissed it."

W. S. B. Hopkins, (*F. B. Smith* with him,) for the libellant.

No counsel appeared for the libellee.

KNOWLTON, J. The libellant and libellee became husband and wife by virtue of a lawful marriage. The agreement that they would not live together had no effect upon the marriage contract entered into in regular form in the presence of a magistrate or minister authorized to solemnize marriages. It is against the policy of the law that the validity of a contract of marriage, or its effect upon the status of the parties, should be in any way affected by their preliminary or collateral agreements. *Barnett* v. *Kimmell*, 35 Penn. St. 13. *Harrod* v. *Harrod*, 1 Kay & Johns. 4, 16.

The consummation of a marriage by coition is not necessary to its validity. The status of the parties is fixed in law when the marriage contract is entered into in the manner prescribed by the statutes in relation to the solemnization of marriages. *Eaton* v. *Eaton*, 122 Mass. 276. *Jackson* v. *Winne*, 7 Wend. 47. *Dumaresly* v. *Fishly*, 3 A. K. Mar. 368. *Patrick* v. *Patrick*, 3 Phillim. 496. *Dalrymple* v. *Dalrymple*, 2 Hagg. Consist. 54.

The libellant is not guilty of such a marital wrong as will prevent him from obtaining a divorce on the ground of his wife's adultery. The parties lived apart by mutual consent, and, on the facts reported, neither could have obtained a divorce from the other on the ground of desertion. In such a separation there was no desertion within the meaning of the word in the statutes in relation to divorce. *Lea* v. *Lea*, 8 Allen, 418, 419. *Thompson* v. *Thompson*, 1 Sw. & Tr. 231. *Cooper* v. *Cooper*, 17 Mich. 205. Living apart by agreement is no bar to a suit for divorce

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brought by either against the other on the ground of adultery. A voluntary separation is not a license to commit adultery; and it has uniformly been held that, in case of adultery under such circumstances, the innocent party may have a remedy against the other in a suit for a divorce. *Morrall* v. *Morrall*, 6 P. D. 98. *Beeby* v. *Beeby*, 1 Hagg. Consist. 142, *note*. *Mortimer* v. *Mortimer*, 2 Hagg. Consist. 310. *J. G.* v. *H. G.* 33 Md. 401. *Anderson* v. *Anderson*, 1 Edw. Ch. 380.

The court has jurisdiction notwithstanding that the parties have never lived together as husband and wife within this Commonwealth. The continuous residence of the libellant in the Commonwealth for more than five years next preceding the filing of his libel brings the case within the exception stated in the Pub. Sts. c. 146, § 5.

On the facts stated in the bill of exceptions, the divorce should have been granted, and the entry must be,

Exceptions sustained.

CALEB HARRINGTON *vs.* THOMAS HARRINGTON.

Worcester. October 1, 1891. — October 24, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Decree in another State — Bar to Action — Evidence.

A resident of California sought to compel a resident of this Commonwealth, by a suit in equity in Rhode Island, to convey a trust estate there situate to the plaintiff, and to pay over to him the rents and profits thereof; and the defendant appeared and was ordered, by a final decree therein, to make the conveyance, which he did, and to pay over the rents and profits, which he failed to do. The plaintiff afterwards brought an action here against the defendant for money had and received, to recover such rents and profits, and before trial thereof also brought here another action against him on the decree to recover the same, evidence of the pendency of which was admitted, against the plaintiff's objection, at the trial of the former action. *Held*, that the decree of the Rhode Island court was a bar to the action for money had and received. *Held*, *also*, that the plaintiff was not prejudiced by the admission of the evidence relating to the action on the decree, even if it was improperly admitted.

CONTRACT, for money had and received, to recover the rents and profits of real estate situated in Rhode Island, and held in

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trust by the defendant for the plaintiff. Writ dated March 22, 1886. Trial in the Superior Court, at the December sitting of 1890, before *Staples*, J., who reported the case for the determination of this court, in substance as follows.

The defendant offered evidence, which was not controverted, that the plaintiff brought a bill in equity, in the Supreme Court of Rhode Island, against this defendant, on December 9, 1884, alleging that the defendant had, since 1852, held the legal title to certain real estate in Providence, in trust for the plaintiff during the plaintiff's absence in California, and had meanwhile received the rents and profits of the same, and praying that the estate might be decreed to belong to the plaintiff, and that the defendant be ordered to convey the estate to the plaintiff and to account to him for the rents and profits, and pay over the same; that the defendant appeared in that suit, and filed an answer therein; that, after due proceedings had, that court entered a final decree, on August 17, 1889, in which said real estate was decreed to be the property of the plaintiff, and the defendant was ordered to pay to the plaintiff, within sixty days, the sum of $6,820.69 and costs, which amount included the rents and profits up to the time of the decree; that no part of this sum had been paid, and no security therefor had been given; and that the defendant had no property in Rhode Island, and that he had never been a resident of that State.

It was admitted that the rents and profits sought to be recovered in this action were of the estate referred to in the suit in equity, and the same rents and profits which were the subject of that suit; and that the decree in that suit was for the balance of all the rents and profits which were chargeable to the defendant, during all the time covered by this suit, after deducting all credits which the defendant was able to prove in the suit in equity.

Evidence was admitted, against the plaintiff's objection, that another action between the parties was pending at the time of the trial in the Superior Court, upon the Rhode Island decree, for the payment of said sum found therein to be due the plaintiff, which action was begun in November, 1889.

The judge ruled that the decree in equity was a judgment which constituted a defence to this suit, and directed a nonsuit.

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If the rulings were correct, judgment was to be entered on the nonsuit; otherwise, a new trial was to be granted.

F. A. Gaskill, for the plaintiff.

F. P. Goulding & F. L. Dean, for the defendant.

MORTON, J. The report states that "the rents and profits sought to be recovered in this suit" are "the same rents and profits which were the subject of said suit in equity" in Rhode Island, and that the judgment or decree in that suit was for "the balance of all the rents and profits which were chargeable to the defendant during all the time covered by this suit, after deducting all credits which the defendant was able to prove in said suit in equity." It is evident that the same matter which is the subject of this suit was included in the suit in equity in Rhode Island, and has been heard and passed upon there. The plaintiff, though not a resident, saw fit to bring his action in that State. The defendant, who also was not a resident there, appeared and filed an answer. After due proceedings and hearings, a decree was finally entered in favor of the plaintiff, for the amount due him in respect of the same rents and profits which he seeks to recover in this suit. It is not contended that the Rhode Island court had not jurisdiction, or that its judgment has been reversed or annulled or attacked by any proceedings in that State. Whether, therefore, the court in that State was "a court of law or equity, of admiralty or of probate," the matter in controversy and the parties being the same in this suit as in that, the judgment of that court is conclusive, and is a bar to the present action. *Bigelow* v. *Winsor*, 1 Gray, 299, 302. *Homer* v. *Fish*, 1 Pick. 435. *M'Rae* v. *Mattoon*, 13 Pick. 53. *Greene* v. *Greene*, 2 Gray, 361, 365. *Sparhawk* v. *Wills*, 5 Gray, 423. *Durant* v. *Essex Co.* 8 Allen, 103. *Mills* v. *Duryee*, 7 Cranch, 481.

In this view of the case, the testimony which was admitted, against the plaintiff's objection, of the pendency of an action here upon the decree, could not have operated to the plaintiff's prejudice, even if it should not have been admitted. According to the terms of the report, the entry must be,

Judgment on the nonsuit.

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WILLIAM FLEMING *vs.* CITY OF SPRINGFIELD.

Hampden. September 23, 1891. — October 26, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Exceptions — Waiver — Defect in Highway — Implied Notice — Reasonable Diligence.

A question not raised in the court below is not open on a bill of exceptions; and if raised and not argued, the excepting party will be deemed to have waived it.

A statement by the plaintiff, in an action for personal injuries, to his physician as to his symptoms at the time, if made for the purpose of medical treatment and advice, is admissible in his favor, although the interview was only a day or two before, or possibly during the trial.

In an action for personal injuries caused by a defect in a highway which the defendant city was bound to keep in repair, it appeared in evidence that the accident was caused by a washout due to the escape of water from a sewer-pipe laid in the way five years before; that this pipe, from its composition and the nature of the soil, was likely to last from three to ten years only, as the defendant's superintendent of streets was informed at the time; that within four or five months of the accident a depression in the surface of the way about fifty feet distant was filled by the defendant without further examination, and within a fortnight a washout had occurred about twenty feet distant, and the city dug down there and replaced all the pipe which appeared to be defective, and examined the projecting ends of what was left and found them all right, but made no further examination; and that upon taking up the pipe after the accident it was found to be in bad condition and full of holes. *Held*, that it was a question for the jury whether the defendant did or did not exercise reasonable care and diligence in preventing the defect which caused the accident to the plaintiff; and that the case was properly submitted to them.

TORT, for personal injuries occasioned by an alleged defect in Liberty Street, a highway which the defendant city was bound to keep in repair.

Trial in the Superior Court, before *Mason*, C. J., who allowed a bill of exceptions, in substance as follows.

The plaintiff's evidence tended to show that on September 13, 1890, as he was driving along Liberty Street after a heavy rain, suddenly the horses attached to his vehicle broke through the surface of the road-bed, and the plaintiff was thrown to the ground, and was injured in his arm and shoulder; that the breaking down of the road-bed was caused by the escape of water through holes in a cement sewer-pipe laid therein washing away the soil and leaving a hole beneath the surface, which after the accident and

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the caving in of the surface was seven feet long and four feet wide, and extended down to the pipe; and that the sewer was laid in 1885 by the defendant's superintendent of streets.

One Driscoll, a manufacturer of cement pipe, testified for the plaintiff that he witnessed the laying of the pipe by the superintendent of streets; that the cement of which the pipe was made was a very cheap grade of cement, and good for nothing; that it would not stand any test, and was not fit for pipe; that the soil of the street at that point was of a clayey nature, the effect of which was commonly to eat up cement pipe; that the life of cement pipe in soil of that kind was from three or four to nine or ten years; and that he told the superintendent that he was making a mistake, and that he did not think the pipe was right or would stand it.

There was also evidence that, four or five months before the accident, at a point in the street about fifty feet distant easterly from the place of the accident, a depression came in the soil over the pipe, and the city filled it up without making any examination beneath the surface; that about two weeks before the accident, at a point about twenty feet easterly from the place of the accident, there was a break in the way which resulted from defective pipe in the sewer; that the defendant dug down to the sewer then, took out all the pipe which at that point appeared to be defective, examined the projecting ends of the pipe that was left, and, finding them all right, put in new pipe to replace the defective pieces, and filled up the trench properly; and that after the accident the city dug up the sewer at all these places, including the place of the accident, and the pipe was found to be in bad condition and full of holes.

Doctor Rice, a physician, who treated the plaintiff for his injury, was called as a witness by the plaintiff, and, after being asked when he saw the plaintiff last and stating that he "saw him day before yesterday the last time," in reply to the further question whether the plaintiff then "made any complaint of present symptoms," was permitted to answer, against the defendant's objection: "I asked him how his arm was, as I had not seen him for some time; 'Why,' said he, 'I don't notice any particular difference, I cannot get it up,' or something to that effect."

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The defendant sought to raise a question by its bill of exceptions as to the sufficiency of a notice seasonably given by the plaintiff to it concerning the cause of his injury, but the bill stated that at the trial the attention of the court was not called to the notice otherwise than by the general request for a ruling made by the defendant at the close of the plaintiff's evidence.

At the close of the plaintiff's case, the defendant requested the judge to rule that the plaintiff on the evidence could not recover; but the judge declined so to rule, and submitted the case to the jury under full instructions as to the obligations of the defendant, to which no exception was taken.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. L. Long, for the defendant.

J. B. Carroll, for the plaintiff.

MORTON, J. 1. If the exceptions raise any question regarding the notice, none was brought to the attention of the court at the trial, and the defendant has not argued any such question to us. It would have been too late to raise it here, and the defendant must be deemed to have waived it if there was one. *Talbot* v. *Taunton*, 140 Mass. 552.

2. The testimony of Dr. Rice was properly admitted. The statement made by the plaintiff purported to be a description of his symptoms at the time it was made, and not a narration of something that was past; and it may be fairly inferred that it was made for the purpose of medical advice and treatment. At any rate, although it was only a day or two before, or possibly during the trial, it does not appear that such is not the case. *Barber* v. *Merriam*, 11 Allen, 322.

3. We also think the case was properly submitted to the jury on the question of the defendant's liability. The injury was caused by a defect in a way which the defendant was bound to keep in repair. The question was whether the defendant did or did not fail to use reasonable care and diligence in preventing the defect. The accident occurred in consequence of the washing out of the earth under the surface of the road-bed, and that was due to the escape of water through a defective sewer-pipe. There was evidence that the pipe which was put in was "a very cheap grade of cement, and good for nothing," and that the effect of

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such soil as that in which it was laid was to eat it up in from three or four to nine or ten years, that it was put down in 1885, and that the defendant's superintendent of streets was told at the time by a witness that he did not think the pipe was right or would stand it.

There was also testimony tending to show that, about four or five months before the accident, a depression came in the street over the pipe, about fifty feet easterly of the place of the accident, which was filled up by the defendant without making any examination; and that on another occasion, about a fortnight before the accident, a break came in the way at a point about twenty feet east of the place of the accident, and that the city dug down there, and took up and replaced all the pipe which appeared to be defective, and examined the projecting ends of the pipe that was left, and found them all right; but it does not appear that it made any further examination. There was also testimony tending to show that the pipe was dug up after the accident at the place of the accident, as well as at the place where the depression and break had occurred, and found to be in bad condition and full of holes.

It was for the jury to say, upon this evidence, whether the defendant had exercised reasonable care and diligence in keeping the way in repair. The knowledge of the superintendent of streets was its knowledge, and it was for the jury to decide whether, in view of that fact and of the depression and break which had occurred in the way so short a time before, and so near to the place of the accident, the defendant had not reason to apprehend the danger and to guard against it. The jury, under instructions as to the obligations of the defendant to which no exception was taken, have decided the question adversely to the defendant, and we think there was evidence to warrant their finding. *Post* v. *Boston*, 141 Mass. 189.

Exceptions overruled.

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MARY SULLIVAN *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Hampden. September 22, 1891. — October 26, 1891.

Present: ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Railroad — Grade Crossing of Highway — Gross or Wilful Negligence.

In an action on the Pub. Sts. c. 112, § 213, against a railroad company for injuring a woman, a foot traveller on the highway, at a grade crossing, there was evidence that she was about seventy years old, of ordinary intelligence, with good sight and hearing, and familiar with the locality; that she was at the time going from her home to a store beyond the tracks to buy provisions; that the weather was clear, and that about forty feet from the middle track, on which she was struck, her view towards an approaching train was uninterrupted for several hundred feet, and from that point extended as she neared the track; that there was no gate or flagman at the crossing, and that the statutory signals were omitted by such train; that before and after entering upon the railroad she looked and saw no train; that when on the nearest track she heard the noise of the train and the danger signals; and that, without looking up to see where the train was, she tried to cross, became confused, and, falling upon the rails, was injured. *Held*, that the question whether she was guilty of gross or wilful negligence was properly submitted to the jury.

TORT, for personal injuries occasioned to the plaintiff by being struck by a locomotive engine at a crossing at grade of the defendant's railroad and a highway in Westfield. At the trial in the Superior Court, *Dewey*, J., at the close of the evidence, refused to rule, as requested by the defendant, (1) that "upon all the evidence in the case the plaintiff cannot recover," (2) that "the plaintiff was grossly negligent, and such negligence contributed to her injury," and (3) that "there is no sufficient evidence to warrant the jury in finding that the plaintiff was not grossly negligent, or that her negligence did not contribute to the injury"; and submitted the case to the jury upon instructions, to which no exception was taken.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The nature of the evidence appears in the opinion.

G. D. Robinson, for the defendant.

J. B. Carroll, for the plaintiff.

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BARKER, J. The plaintiff, a foot traveller on the highway, was struck by a locomotive at a grade crossing. The accident happened on a clear summer day, about eleven o'clock in the forenoon. The railroad had, within a short time before the accident, been raised so as to be about three feet higher than the level of the sidewalk on which the plaintiff approached from the east. The work of grading was unfinished, and the crossing was in a broken and poor condition, with one plank on each side of the rails. The ground was rough, so that teams had to walk across. There were three railroad tracks at the crossing, and the locomotive was on the middle track, coming from north to south. The plaintiff's line of travel was diagonally across the tracks. From the end of the sidewalk to the tracks the space was filled with soft gravel. The height of the car windows from the ground was seven feet, and from the level of the sidewalk, ten feet. A building and the branches of a butternut tree obstructed the view from the sidewalk. These were the only obstructions, looking northward, to a bridge, a distance of nine hundred and eighty-five feet from the place of the accident. After a person passed on to the line of the railroad from the sidewalk, there was no obstruction to his view except the branches of the tree, and after reaching the nearest track there was no obstruction. A person approaching the railroad in the plaintiff's line of travel could see in a clear line of vision from a point forty-two feet from the nearer rail of the middle track three hundred and fifty-two feet northward; at thirty-two and one half feet, nine hundred and eighty-five feet; at twenty-eight and one half feet, thirteen hundred and fifty-eight feet; and at twenty-three and one half feet, fourteen hundred and sixty-eight feet. There was no gate nor flagman at the crossing. The plaintiff lived in the vicinity, was familiar with the locality, and accustomed to pass over the crossing. She was between sixty and seventy years of age, of ordinary intelligence, and possessed of good sight and hearing.

The declaration was in two counts, the first under the Pub. Sts. c. 112, § 213. At the close of the evidence the court ruled that the plaintiff could not recover on the second count, which was at common law, and the jury found a verdict for the plaintiff on the first count, and found specially that the defendant

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neglected to give the signals required by the statutes. The question raised by the bill of exceptions is, whether the court was justified in submitting the case to the jury upon the first count, or whether upon all the evidence it appeared, as matter of law, that the plaintiff, in addition to a mere want of ordinary care, was guilty of gross or wilful negligence.

In addition to the facts above stated, there was evidence tending to show that, if the plaintiff had looked at all before going on the track, she could have seen the approaching train a quarter of a mile away; that she was familiar with the passing of trains, and had often before run across ahead of the train; that she did not look up the track at all; and that shortly before she was struck by the locomotive, and before she had entered upon the middle track, and while she was yet in a place of safety, she had heard the sharp whistles, or "toot, toot, toot" of the engine, and knew that the train was coming at speed, and, notwithstanding this, attempted to cross in front of it. There was also evidence tending to show that before she left the sidewalk the train was actually in full view, approaching the crossing; that when she heard the danger whistles, she looked up directly at the train, and hurried up to get across, and tried to walk faster, and started to run ahead of the train; that when the danger whistle sounded she was between the east and middle tracks; that she fell down before she was struck, and fell on the west rail of the middle track; that if she had stood still when the danger whistle sounded she would have been safe; and that she stumbled and fell on her knees and elbows, between the two rails of the middle track, and was struck by the train as she was trying to rise. One of the plaintiff's witnesses testified that he heard the danger whistles, turned his eyes to the crossing, and saw the old lady; that her hands were up in this manner (showing), and she made one step and down she went, and recovered herself to the extent of getting partially on her hands and knees.

The plaintiff herself testified that, before she went on the railroad track, she looked up and down and did not see any engine or train, and did not hear anything; that she started to go across the track; that the track was soft; that she heard a "big boo" coming, and did not know what it was, and did not know anything else that happened there. She said, upon

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cross-examination, that she was going to the store to get some groceries, and had a pail in her hand, and wore a shawl and hood; that before she went on the track she looked here and there, up and down, and saw no train, but saw the bridge; that when she was on the sidewalk she looked, but saw no cars, and saw nothing until she heard the noise when the train came down; that when she got upon the track she looked, and saw no train, and did not see the train at all until she heard it coming; that she was on the first track when she heard the noise, and did not then look to see where the train was, but kept right on, and tried to clear the track; that she started to go right across just as fast as she could; that she did not look to see if the train was on the next track coming; that she did not hear the train until it was on her; that when she heard the noise the track was soft, and she started to run across, and fell down right on the track; that when she was on the first track she looked up and down, and did not hear the train; that before she went on the track she looked up and down, and did not see any train; and that she did not hear any sharp, short whistles, or any whistle at all.

The defendant introduced in evidence the whole testimony given by the plaintiff at a former trial of the case, in which she testified, upon cross-examination, that when she got right on the track she heard the "toot, toot, toot," just as it was right up to her; that it was the engine that made the noise, and that it scared her out of her senses; that when she heard the noise she was going back from the track, and started to run, and ran right on the track, and tumbled down on the track in front of the engine; that the noise that was in her head, and the train, and all that, took her senses right away; and that it was the first place in her life that she had not her senses.

It is plain, upon this evidence, that the plaintiff was not in the exercise of ordinary care. If she looked, as she testified that she did, and did not see the approaching train, she looked carelessly. If she looked and did see it, it was certainly not ordinary care to attempt to walk in front of it. If she did not look, her failure was, at least, a want of ordinary care. But a mere want of ordinary care would not defeat her recovery under the first count of her declaration, and the burden of proving

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gross or wilful negligence rested upon the defendant. It is apparent that from the evidence a jury would be justified in finding that the plaintiff was in fact guilty, in addition to a mere want of ordinary care, of gross or wilful negligence. The evidence discloses no need or motive which would justify her in taking extraordinary risks. She was merely walking from her home to a neighboring store to purchase groceries. She was familiar with the crossing and its attendant dangers. If, as might be found from the evidence, she attempted in such circumstances to cross in full view of a rapidly approaching train, without looking to see whether or not danger was imminent, her negligence would be properly characterized as gross. If, knowing that the train was approaching at speed, and realizing the danger of attempting to cross in front of it, she understandingly and intentionally took the risk of so doing, without any other motive than to avoid waiting while the train passed, her negligence would be gross and wilful. *Copley* v. *New Haven & Northampton Co.* 136 Mass. 6. *Debbins* v. *Old Colony Railroad*, *ante*, 402. If situations similar to these, which plainly might have been found by the jury, are the only ones which could fairly and reasonably be found from the evidence, then it was the duty of the court to rule, as matter of law, that the plaintiff upon the evidence, was guilty of gross or wilful negligence, and to direct a verdict for the defendant. But, in our opinion, other inferences consistent with the theory that the plaintiff was guilty only of want of ordinary care may fairly be drawn from the evidence, and, if so, the court was right in submitting the question to the jury. The usual ringing of the bell and sounding of the whistle were omitted. If, before entering upon the railroad, the plaintiff looked up and down and saw nothing, and again when entering upon the east track looked and saw no train, it could not be said, as matter of law, that up to that point she was guilty of gross or wilful negligence in not having become aware of the approach of a train which came without the required and customary warning. If, when made aware of its approach by hearing the danger whistles, she was confused by the sudden peril, and went in front of the train because of her confusion, she could not be said to have been guilty of gross or wilful negligence. *Copley* v. *New Haven & Northampton Co.* 136 Mass. 6.

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It is plain that either of the situations supposed, and perhaps others consistent with gross or wilful negligence, or with the want of it, may have been fairly found by a jury from the evidence. Under such circumstances it is the province of the jury to deal with the evidence under proper instructions from the court, which in this case were no doubt given.

Exceptions overruled.

HARRY A. HANNAH *vs.* CONNECTICUT RIVER RAILROAD COMPANY.

Hampshire. September 23, 1891. — October 26, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Railroad — Defect in Road-bed — Negligence — Employee's Due Care — Exceptions.

A brakeman employed in a railroad freight-yard, while uncoupling cars, stepped into a hole in the road-bed under a switch rod, and was caught and injured. In an action against the railroad company to recover for such injuries, there was evidence that the hole or space under the rod was larger than need be for working the switch, and more than under any other rod in the yard, and looked as though it had been dug out for a drain; that the hole had existed for a week without the plaintiff's knowledge, and he did not notice it at the time, and it was afterwards partially filled up and made safe; that he was acting under orders of the conductor of a train he was helping to make up, and went between the cars and rails to pull the coupling-pin, which stuck; and that it was customary and quite as safe to go between the rails under such circumstances. *Held*, that whether the defendant was negligent and its road-bed defective, and whether the plaintiff was in the exercise of due care, were for the jury.

There was also evidence that before the accident the defendant's yardmaster had told the plaintiff not to go between the rails in uncoupling cars, but there was no evidence of the yardmaster's having any authority over the plaintiff, or of any rule of the company forbidding the going upon the track in uncoupling cars. *Held*, that a ruling that the plaintiff could not recover if he went upon the track after being thus directed by the yardmaster, was properly refused.

A ruling which assumes that a certain act of the plaintiff was unnecessary, when such necessity is one of the issues directly involved in the case on which evidence is introduced on both sides, is properly refused, and such refusal affords no ground of exception.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ as a brakeman in its freight-yard at Holyoke.

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At the trial in the Superior Court, before *Barker*, J., the plaintiff testified that on December 23, 1889, he was in the employ of the defendant as a brakeman, and for two or three months before that time had worked in its Holyoke yard, and was familiar with the same, and with the position, construction, and working of the various switches therein situated; that during the forenoon of that day he was engaged in assisting to make up a freight train, of which one Campbell was the conductor; that two box cars were to be cut off from the train, and Campbell told him to uncouple them; that he then went between the two cars and within the rails to uncouple them, and walked along between the cars; that the cars were going slowly, and a man could keep up with them without walking very fast, but the speed was increasing as it was down grade; that the coupling-pin stuck when he tried to pull it out, and he asked Campbell, who was on the top of the forward one of the two cars, to set up the brakes and relieve the pressure on the pin; that as the car slackened he felt his foot go into a hole under a switch rod connected with one of the switches beside the track; that, failing to get his foot out by pushing it with the other foot, he threw himself out from between the cars, and, the wheels passing over his leg which remained fast, he was injured; that some of the brakemen in uncoupling cars reached in between them from a position outside the rails, and others stepped in between the rails; that he was accustomed to go between the cars; that it was just as safe to pull the pin when between the rails as outside of them, and might be safer; and that he had worked over and about this switch during the time he was in the yard, and had never noticed any hole there.

There was also evidence that the switch to which the rod was attached under which the plaintiff's foot was caught was called a stub switch, and was not of a modern pattern, but was similar to other switches used in that freight-yard; that this rod, by which the rails were moved, extended across the track, being clamped to the under side of each rail; that the rod was placed over the soil of the road-bed and between two of the ties; that it was necessary to leave a space under the rod for the purpose of keeping it free from snow and ice, the smallest space practicable being half an inch, and the usual space about two

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inches; that the distance of this rod from the edge of the tie where the plaintiff's foot slipped under it was five and a half inches, and from the bottom of the rod to the soil directly under it was the same distance; that the formation of the land at this point was such that surface water accumulated on one side of the track; that the hole under the rod was scooped out between the ties, and had been there about a week, and sloped from one rail to the other, and looked as if it had been dug out for a drain to carry off the water thus accumulating; and that after the accident the depth of this depression under the rod was reduced to a depth of one and a half inches, so that a man's foot could not slip under the rod.

The defendant's yardmaster testified that it was not necessary for a brakeman to go between the rails in pulling a coupling-pin, and that he never did it himself; that there was no difficulty in reaching in to draw the pin from outside the track, though brakemen frequently went between the rails for that purpose; and that (but in this he was contradicted by the plaintiff) he had had occasion to speak to the plaintiff about going in between the rails for that purpose, and had told him on the day of the accident, and before it happened, that he did not wish to see him do it again.

The defendant asked the judge to rule as follows: (1) "That upon all the evidence the plaintiff cannot recover"; (2) "If the jury find that the plaintiff had been informed by the yardmaster that it was unsafe to go between the tracks, and directed him to keep out from between them, he cannot recover for any injury received while going between the tracks, it not appearing that it was necessary for him to do so"; and (3) "If the jury find that, on going between the cars and rails to remove the pin, plaintiff found that he could not draw the pin, and continued to walk between the cars and between the tracks, until the brakeman should apply the brake so as to give him slack, and was injured while so walking, he was not in the exercise of due care, and cannot recover."

The judge refused so to rule, and submitted the case to the jury upon the questions whether the defendant was negligent and the plaintiff was in the exercise of due care, instructing them, among other things, that if the plaintiff found he was exposed to

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a danger to which he ought not to have been exposed, and, knowing and realizing the same, he continued in the defendant's employment, then he was to be held to have accepted the additional risk which he need not to have accepted unless he saw fit, and could not recover for any injury resulting therefrom; and that if he knew that there was a dangerous place in the track, and understood there was an arrangement which might catch his foot if he went between the rails and walked there with one car in front of him and one behind him, without its being his duty to do so, then he could not recover, because he was incurring a known danger, and not in the exercise of his duty.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

G. Wells & J. Barnes, for the defendant.

W. G. Bassett, for the plaintiff.

MORTON, J. It was a question of fact for the jury whether the place where the plaintiff was injured constituted a defect in the road-bed, and whether its existence was due to the negligence of the defendant. There was evidence tending to show that it had been there a week or more, and looked as though it had been dug out for a drain, and that there was a larger space between the switch-rod and the ground than at any other switch in the yard. There was also testimony tending to show that the distance between the switch-rod and the ground was about five and a half inches, and that the distance was about the same between the switch-rod and the tie. Some of the witnesses spoke of it as a hole; and evidence was introduced, without objection, that after the accident, and before the trial, it was partially filled up and repaired, so that the distance between the switch-rod and the ground was made considerably less than at the time of the accident. It is true that the railroad company was not bound to have the distance between the switch-rod and the ground the least that would admit of the working of the switch, but it was required to use reasonable care in seeing that the place was such that those of its employees who might have occasion to pass over it in the discharge of their duties could do so with safety, provided that they themselves were in the exercise of due care. It was for the jury, upon all the evidence, to say whether the railroad company had fulfilled this duty, and

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whether the situation in which the ground was left under and around the switch-rod and between the rails constituted a defect in the road-bed. The jury must have found that the defendant did not perform its duty, and that the road-bed was defective, and we think there was evidence that would warrant these findings.

It was also a question for the jury whether the plaintiff was in the exercise of due care. It was for them to give such weight as they thought it fairly deserved to the testimony relating to his familiarity with the yard and with the switch where the accident occurred and its condition; to that relating to the manner in which he attempted to uncouple the cars, and to the reasons given by him for going between the cars and walking along between the rails; to the testimony of the yardmaster as to what he told the plaintiff about going between the cars; and to other matters which appeared in evidence on the one side or the other. Even if the plaintiff had known of the existence of the hole, it was not conclusive evidence of a want of due care on his part for him to get into it, if that happened while he was in the discharge of his duty, and while his attention was directed to the work in which he was engaged. *Snow* v. *Housatonic Railroad*, 8 Allen, 441. *Plank* v. *New York Central & Hudson River Railroad*, 60 N. Y. 607.

The plaintiff, however, testified that he never noticed any hole or anything of the kind there. There was testimony that it was customary to step in between the cars to couple or uncouple them; that whether the man stepped in between the rails depended on circumstances; that the chances were just as good in between the cars and the rails as on the outside; that if the pin stuck, one could not always stand outside the track and rails and pull it out; and that when the plaintiff went to pull out the coupling-pin it stuck, and he walked along between the cars, which were moving slowly, trying to pull the pin out, and waiting for them to slack in accordance with his request, so that he might pull the pin out and uncouple the car as the conductor had directed him to do, and that he did not think anything at all about the switch. We cannot say, upon this and other evidence in the case, that the plaintiff was, as matter of law, guilty of negligence, and that the verdict of the jury in

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his favor was not warranted. *Lawless* v. *Connecticut River Railroad*, 136 Mass. 1. *Gustafsen* v. *Washburn & Moen Manuf. Co.* 153 Mass. 468.

The second ruling requested by the defendant was rightly refused. The ruling asked for assumed that it was not necessary for the plaintiff in the discharge of his duty to go between the rails. Whether it was necessary or not was one of the issues directly involved in the case, and on which testimony was introduced on both sides. The court could not, therefore, assume that it was not necessary. Again, it does not appear what authority the yardmaster had over the plaintiff, or whether he had any. If he had none, then what he said to the plaintiff was in effect nothing more than a caution addressed by one fellow servant to another. Perhaps the real significance, in either aspect, would lie in its effect upon the question whether the plaintiff did or did not use due care; but in the present case the error lay in assuming what was not shown to exist, namely, that the plaintiff was bound to obey the directions of the yardmaster. Further, if we assume that the plaintiff was bound to obey the directions of the yardmaster, and that what was said by the yardmaster to the plaintiff was a direction not to go between the rails in removing the coupling-pin, still there was no evidence of any rules established by the defendant road forbidding it, and the plaintiff was afterwards told by Campbell, the conductor of the train which the plaintiff was helping to make up, and under whose immediate control he was at the time, that he wanted the cars cut off in between; and the plaintiff may well have understood that, even if what was said by Campbell was not an order to go in between the cars, he was authorized to cut them apart by going in between them in such mode as appeared to him in the exercise of ordinary care to be necessary.

The instructions requested were, therefore, rightly refused, and those that were given are, so far as stated in the bill of exceptions, correct. The entry must therefore be,

Exceptions overruled.

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ORLANDO MIXTER *vs.* ALONZO B. WOODCOCK.

Worcester. September 28, 1891. — October 26, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Estate for Life — Adverse Possession — Disseisin.

A widow became a tenant for life of real estate under her husband's will, but occupied the same for over thirty years until her death, believing that she owned it absolutely, having meanwhile mortgaged the same to one with a like belief. *Held*, that her possession was not in its nature an adverse possession; and that her mortgagee acquired no title by what she did, and could not, after foreclosure without gaining possession, recover the premises from one having a possessory title merely.

WRIT OF ENTRY, dated December 7, 1886, to recover a parcel of land on Fruit Street in Worcester. After the former decision, reported in 147 Mass. 613, the action at law was changed in the Superior Court to a suit in equity. At the hearing, before *Blodgett*, J., it appeared in evidence that John E. Luther, who died in June, 1856, leaving a widow but no issue, was seised in fee of the parcel in question; that by his will his widow, under the former decision, took a life estate only in the premises, but remained in possession from the death of the testator until her death in 1886, believing that she took an estate in fee under the will; and that she occupied them openly in all respects as her own, claiming title in fee thereto. On three several occasions, in 1862, 1876, and 1885, she gave mortgages thereof in the usual form, all of which were recorded, and all but the last of which were discharged. The plaintiff, who was the demandant in the writ of entry, was the mortgagee named in the last of these mortgages, and believed that the widow had a title in fee at the time he took his mortgage. The condition of the mortgage having been broken, he duly foreclosed, under a power of sale contained therein, and a conveyance was afterwards made to him. In August, 1886, he entered upon the premises for the purposes of foreclosure, but never had any other possession thereof. The defendant, who was a tenant in the writ of entry, made no claim of title, but was in possession at the time the writ of entry was brought, and continued in possession of the demanded premises at the time of the hearing.

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The judge ruled that, as matter of law, it having been decided that the widow of John E. Luther took a life estate only under the will, she could not acquire a title in fee to the premises by adverse possession, and that the plaintiff took no title by his mortgage and its foreclosure which would enable him to maintain this suit in equity, or an action at law, against the defendant for the recovery of the land; and dismissed the bill, and reported the case for the determination of this court.

J. Mason, for the plaintiff.

J. H. Bancroft, for the defendant.

MORTON, J. Without undertaking to say that in no case could the occupation of a life tenant be so long continued and of such a character as to vest in him a title in fee by adverse possession, and without intending to intimate that it could, we think that the ruling of the judge who heard this case was correct. Under the decision in the case of *Mixter* v. *Woodcock*, 147 Mass. 613, the only estate which the widow had was a life tenancy. She was in possession of the premises as a life tenant. Her belief that she owned the property absolutely did not give her any additional rights, nor did the like belief on the plaintiff's part help matters. That simply made the mistake a common one. The widow was not in possession under a deed or instrument which purported to give her a fee, but in fact only gave her a life estate, and which might have afforded some color for her belief that she owned the fee and for her acts; she was in possession under the will of her husband, which did not purport to give, and did not in fact give, her anything except a life estate. If the mortgages executed by her may be regarded as acts of disseisin, so that the reversioner could have entered, he was not obliged to do so, but could wait until his right of entry accrued upon her death; and neither the widow nor those who claim under her would acquire any rights against him, or title to the property, by virtue of her or their occupation in the mean time. *Wells* v. *Prince*, 9 Mass. 508. *Wallingford* v. *Hearl*, 15 Mass. 471. *Tilson* v. *Thompson*, 10 Pick. 359. *Miller* v. *Ewing*, 6 Cush. 34. The demandant must recover on the strength of his own title. Failing to show title, he must at least show a better right to possession than the tenant. This he does not do.

The decree dismissing the bill must therefore be

Affirmed.

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DANIEL DONAHUE & another *vs.* GEORGE E. HUBBARD.

Worcester. September 28, 1891. — October 26, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Husband and Wife — Estate in Entirety — Conveyance of Husband's Interest to Wife.

Where an estate is held by a husband and wife in entirety, he may make a valid conveyance of his interest to his wife, through a third person.

CONTRACT, for money had and received, brought by Daniel Donahue and Anna Donahue, his wife, jointly, against the assignee of a mortgage, to recover the surplus proceeds received by him upon a sale of the mortgaged premises. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts, which so far as material to the point decided were as follows.

On October 16, 1882, one Sullivan did by a warranty deed, "in consideration of three thousand four hundred and thirty-five dollars, paid by Daniel Donahue and Anna Donahue (husband and wife), . . . convey unto the said Daniel Donahue and Anna Donahue a certain tract or parcel of land" in Worcester. On the same day, Daniel and Anna Donahue executed a mortgage of the premises to secure the sum of $2,450, which mortgage, on February 20, 1888, was duly assigned to the defendant. The agreed statement of facts then recited that "on September 12, 1883, said Daniel Donahue alone executed a quitclaim deed of all his right and title in said premises to one Timothy Keane, a copy of which is hereto annexed marked B, and on the same date said Keane executed to said Anna Donahue a quitclaim deed of all his right and title in said premises, a copy of which is hereto annexed marked C, both of said last conveyances being made with the knowledge and oral assent of said Anna Donahue." The deeds marked A and B were quitclaim deeds, given "in consideration of one dollar and other valuable considerations." In May, and again in December, 1888, Anna Donahue alone executed and delivered to the defendant a mortgage on the premises, each to secure the sum of $200, and the $400 re-

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sulting therefrom was paid to her in Daniel's presence and at his request, and he gave oral assent to both mortgages, and in them released all his right to any estate by the curtesy in the granted premises. On June 3, 1889, the defendant sold the premises under a power of sale contained in the mortgage of October 16, 1882, and there remained in his hands the sum of $431.30, to recover which this action was brought. The plaintiffs demanded payment of this surplus, but the defendant refused to pay it over, claiming the right to apply the same to the satisfaction of the second and third mortgages given him by Anna Donahue alone, which at the date of the foreclosure amounted in principal and interest to $411.66.

E. J. McMahon, for the defendant.

H. L. Parker, for the plaintiffs.

ALLEN, J. Prior to the St. of 1885, c. 237, a conveyance of land to husband and wife created the peculiar title sometimes called an estate by entireties, or in entirety. Neither could sever this title so as to defeat or prejudice the title of the survivor. *Pray* v. *Stebbins*, 141 Mass. 219, and cases cited. We find nothing, however, to show that it has ever been considered that a husband could not convey his title through a third person to his wife. On the other hand, the peculiar feature of this kind of estate is that each is secure against an impairment of rights through the sole act of the other. 2 Bl. Com. 182. Cruise Dig. tit. 18, c. 1, §§ 44–49. 1 Preston, Est. 131. 2 Kent Com. 132; 4 Kent Com. 362. 1 Washb. Real Prop. (3d ed.) 425. There is nothing in this to prevent the wife's acquiring the title of her husband, and in *Meeker* v. *Wright*, 76 N. Y. 262, 272, it was held that this might be done. This part of the decision in *Meeker* v. *Wright* was not questioned in *Bertles* v. *Nunan*, 92 N. Y. 152, or in *Zorntlein* v. *Bram*, 100 N. Y. 12, and we have found nothing in any of the books denying the doctrine.

Such a transfer of the husband's title appears to have been made in the present case by the deeds of Daniel Donahue to Keane, and of Keane to Mrs. Donahue. It is true that the statement of facts does not show in express terms that both of these deeds were a part of one and the same transaction, as it properly should have done. But the plaintiffs in their brief recite that the husband had released all his rights to his wife

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through a conduit. The deeds were both executed on the same date; the consideration expressed was one dollar and other valuable considerations; the statement of facts recites that both of these conveyances were made with the knowledge and oral assent of Mrs. Donahue. We believe we should defeat the intention of the parties if we did not assume that the deeds were parts of one transaction, since the counsel for both parties have so assumed in their arguments.

The effect was that the title vested in Mrs. Donahue. Her subsequent mortgages to George E. Hubbard were, therefore, valid, and he, upon a sale made under the power of sale contained in the first mortgage, might legally retain from the proceeds the sums due to himself under the two subsequent mortgages.

This would still leave a small balance of $19.64 in his hands to be paid over to Mrs. Donahue. This, however, cannot be recovered in an action brought by her husband and herself jointly. Application may be made in the Superior Court for leave to amend by striking out the name of Daniel Donahue as co-plaintiff, and, if granted, Mrs. Donahue may have judgment for said sum; *Fay* v. *Duggan*, 135 Mass. 242; otherwise, the order must be, *Judgment affirmed.*

FANNIE J. POOR *vs.* JOSHUA M. SEARS.

Suffolk. November 11, 12, 1890. — October 26, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Owner of Building — Lease — Furnishing Steam Power by Appliances on Leased Premises — Negligence — Due Care — Proximate Cause — Evidence.

If the owner of a building, who is engaged in furnishing for hire steam power to adjoining buildings, after leasing a part of his building, continues thus to furnish power by means of appliances upon the leased premises, he is bound to exercise reasonable care to see that such appliances are in suitable condition to perform the work without danger to persons rightfully on the premises and themselves in the exercise of due care; and if he, or his servants or agents, are negligent in the use or management of such appliances, such a person in the

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employ of his lessee, who is injured thereby while in the exercise of due care, is entitled to recover of him for the injuries so sustained, irrespective of the lease or of any duty of the lessee under it to care for such appliances.

On the issue whether the owner of a building engaged in furnishing steam power for hire to adjoining buildings used ordinary prudence and care in the use and operation of certain shafting and pulleys for that purpose, evidence is competent that a shaft which broke and injured a person rightfully on the premises, was not sufficiently supported and should have had an additional hanger, that shelving underneath it would have tended to afford protection and was often placed under shafts similarly hung, and that safety would have been promoted by a larger shaft.

Under a declaration, in an action for personal injuries, alleging that the plaintiff was injured by a fall of a shaft through the "negligence and carelessness of the defendant," evidence is admissible that a subsequent examination of the broken ends of the shaft disclosed dark streaks extending from one third to one half way around it, as though there had been a flaw or a previous crack in it.

On the issue whether the owner of a building engaged in furnishing for hire steam power to an adjoining building, after leasing rooms in the building, used and exercised control over shafting and belting situated in such rooms, evidence is competent that, after an accident resulting from the breaking and fall of a shaft in the room, he repaired a stairway therein damaged by the fall, and caused a belt also therein to be sheathed, and evidence is also competent that his engineer continued to oil the shaft until it fell, and to lace the belts thereon when necessary, although the lease is already in evidence.

If the owner of a building, after leasing a part thereof, negligently continues to furnish power to an adjoining building by the use of improper appliances on the leased premises, and one of his lessee's employees is injured, the failure of such lessee or of his other employees to give to the employee injured any warning of the danger, does not constitute negligence, or a want of due care, on the part of such employee, or relieve such owner from the consequence of his own carelessness or of that of his servants.

On the issue whether the plaintiff, who was employed in a printing establishment and was injured by the fall of a shaft hung over a stairway connecting the fourth and fifth floors of the same, was in the exercise of due care, there was evidence that the plaintiff was a type-setter and worked on the fourth floor, and it was her duty to carry galleys of type to the fifth floor; that she remembered starting to go up the stairway with a galley of type, but nothing more until she found herself in the hospital; that a foreman, after sending a boy to the engineer to notify him that something was wrong, a few seconds before the shaft fell, called out from the top of the stairway to keep off the same; and that several other employees noticed that the shaft was out of order shortly before it fell, and some of them working near the plaintiff heard the foreman tell the boy to warn the engineer. It did not appear that the plaintiff's attention was called by any one to the condition of the shaft, or that she heard any remark about it. *Held*, that the evidence was sufficient to enable the jury to pass fairly upon the question of due care on the plaintiff's part, and that it was properly left to them to do so.

TORT, for personal injuries. The first count of the declaration was as follows: "And the plaintiff says that the defendant is the owner of premises No. 41 Arch Street, in said Boston, and

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also owns and has the care of certain machinery in said building; and defendant negligently and carelessly permitted a part of his machinery to remain in a dangerous condition and position. And plaintiff further says that defendant carelessly and negligently omitted to place around said machinery a proper protection or to enclose it in a proper framework. Said building is occupied by Messrs. Rockwell and Churchill, and used as a printing establishment. And plaintiff says she was in the employ of said Rockwell and Churchill, and was at work in said building on the fifth day of February, A. D. 1887; while attending to her duties and in the exercise of due care, a portion of said defective machinery of the defendant's, namely, a large pulley and a piece of shafting, fell from the top of the room in which plaintiff was, striking plaintiff on the head, knocking her down, and crushing her head and breaking the bones of the face in a number of places, and she was otherwise greatly injured, which rendered plaintiff unconscious for a long time, whereby she suffered great agony, permanent injury, and disfigurement, resulting in a long sickness, from the effects of which she has not recovered. And plaintiff says she has been internally injured by the violence of the injury and the general shock, inasmuch as before said injury she was strong and healthy, and was able to attend to her usual avocations, and she is now unable so to do owing to lameness, nervousness, and pain."

The second count was as follows: "And the plaintiff says, on the fifth day of February, A. D. 1887, while in the exercise of due care, she was injured by the falling of certain machinery in a building No. 41 Arch Street, said injury being caused by the negligence and carelessness of the defendant."

Answer, a general denial.

At the trial in the Superior Court, before *Barker*, J., it appeared in evidence that the defendant, in 1876, became the owner of a building numbered 41 Arch Street in Boston, in the basement of which was a steam engine and boiler, by which steam power was furnished to that building as well as to the adjoining building numbered 39 on that street, and to a building beyond the same owned by one Amory; that in 1874 the defendant's predecessor in title made an arrangement for hire with the firm of Rockwell and Churchill, printers, who at that

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time were tenants of the building numbered 39 Arch Street, which belonged to a third person, to supply them with steam power for use in their business, and for this purpose a shaft about ten feet long was run through a hole cut in the division wall between the buildings above the fifth floor of each; that this shaft was supported by two hangers dependent respectively from the ceiling over the fifth floor in each building; that the hanger in the defendant's building was let into a wooden partition enclosing a stairway which led up alongside the division wall from the fifth floor of his building; that inside this partition, and between it and the division wall, there was upon this shaft an iron pulley, which carried the belt transmitting the power by means of belting and other shafting from the engine in the basement to the next building; that directly beneath this pulley and this portion of the shaft was another stairway leading from the fourth floor to the fifth floor of the defendant's building, which stairway, except the lowest step, was cut off from the fourth floor by a wooden partition; that this bargain for supplying power to Rockwell and Churchill in the building numbered 39 Arch Street was continued by the defendant after he became the owner of the building numbered 41 Arch Street, and the defendant was furnishing them steam power at the time of the accident at so much per horse power; that up to April, 1882, the defendant's engineer in charge of the engine in the basement always oiled the shafting in the defendant's building, and laced the belts therein when necessary; that in March, 1882, the defendant executed to Rockwell and Churchill a lease, which was introduced in evidence, of the second, third, and fourth floors of his building, which lease required them to "keep all and singular the said premises and fittings in such repair as the same are in at the commencement of said term, or may be put in by the said lessor or his representatives during the continuance thereof"; that subsequently a door was cut through the division wall, and that firm went into occupation of the leased premises, and continued to occupy the same under the lease and a renewal thereof, and to use the same as composing and proof rooms; and that Rockwell and Churchill used no steam power in the defendant's building, but continued to hire from the defendant the steam power used by them in the building numbered

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39 Arch Street. The plaintiff contended that the shafting and belting on the fifth floor of the defendant's building were not covered by this lease; and the defendant contended that they were covered.

There was also evidence that on February 5, 1887, the plaintiff was in the employ of Rockwell and Churchill as a type-setter, and worked at a frame on the fourth floor of the defendant's building; that it was her duty, after filling a galley with type, to carry it up the stairway leading from that floor to the fifth floor; that on that day, as she was going up the stairway with a galley of type to put it upon the press, the shaft above described broke at a point over the stairway, and the end supported by the hanger fell with the pulley upon it, and, after striking the stairs, struck the plaintiff, causing the injuries in question; that just before the accident one Woods, foreman of the proof-room of Rockwell and Churchill, whose desk was on the fifth floor near the head of the stairs, had his attention called to the pulley and to a grating noise due to friction of the machinery, and sent a boy to tell the engineer that there was something wrong with the shafting; that, after thus sending the boy, Woods stood at the head of the stairs watching the shaft; that the shaft had begun to wabble, and as the wabbling increased Woods called out from the top of the stairs about five seconds before the shaft broke to keep off the stairs; that he was watching the shaft as it fell, and did not see the plaintiff as she came up the stairs; and that several of the employees of Rockwell and Churchill besides Woods saw that the shaft was bent and had begun to wabble, and heard the same grating noise from four to five minutes before the shaft broke and fell, and others who were at work near the plaintiff heard Woods tell the boy to go to the engineer and tell him that the shafting was out of order. The plaintiff testified that she remembered starting to go up the stairs with the galley of type, but remembered nothing further until she found herself in the hospital; that she was unable to recollect anything that occurred or was said in the room where she was at work before she was injured, except that something was said about picking up some type that had fallen upon the floor, nor did she recollect hearing Woods give any order to the boy.

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There was also evidence, which was introduced by the plaintiff, against the defendant's objection, after the lease from the defendant to Rockwell and Churchill had been put in evidence, that the defendant's engineer in charge of the engine in the basement continued to oil the shaft which fell, and the other shafting on the premises covered by the lease, after the lease was given as well as before, and to lace the belts on this shafting when it was necessary, and that Rockwell and Churchill took no care of either the shafting or belting; and the defendant excepted. Evidence was also introduced, against the defendant's objection, that after the accident the broken ends of the shaft disclosed, upon examination, rust upon them extending from one third to one half way around the same, and dark streaks, as though there had been a flaw or previous crack in it; that a shaft hung like the one in question was insufficiently supported, and should have had an additional hanger in the middle for that purpose, which would have had a tendency to keep the shaft in place; that if there had been such a third hanger near the place of fracture, it might have held the shaft up; that if there had been shelving underneath the shafting, it would have tended to afford protection in case of a break, and might have prevented the accident, and that such shelving was very often placed under shafts like the one in question, where it was necessary for men and women to pass under it; that safety would have been promoted by a larger shaft than the one in question, and by placing a bench underneath the shaft; and that after the accident the defendant caused the stairs, which were broken and damaged by the fall of the shaft upon them, to be repaired, and also caused some wooden sheathing to be placed just beneath belting running near the ceiling above the fifth floor. There was no evidence that the attention of the plaintiff had ever been called to the shaft in question.

The defendant requested the judge to instruct the jury as follows:

"1. On all the evidence, the action cannot be maintained against the defendant.

"2. Upon all the evidence in the case, the duty of keeping in repair the shaft which fell and injured the plaintiff was the duty of the tenants to whom the premises were leased, and was not

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the duty of the defendant, and the defendant is not liable for any injury which was caused to a person in the employ of the tenants by a defect in the shaft arising after the tenants went into occupation under their lease.

"3. Upon all the evidence in the case the duty of keeping in repair the shaft which fell and injured the plaintiff was the duty of the tenants to whom the premises were leased, and was not the duty of the defendant, and the defendant is not liable for any injury which was caused to a person in the employ of the tenants by a defect in the shaft existing before the tenants went into occupation under their lease, unless such defect was one which was known to the defendant or to his servants or agents, and was not known to the tenants, and could not have been discovered by them by a reasonable examination.

"4. If the shaft which fell and injured the plaintiff was negligently hung, or insufficiently supported by reason of having only two hangers to sustain it instead of three or more, or by reason of the places to which such hangers were secured, or for the want of other safeguards, and if the injury to the plaintiff was caused by such defects of hanging or want of supports or safeguards, or any of them, the defendant is not liable for such injury, if the condition of the shaft in these respects remained unaltered from the time of the leasing of the premises to Rockwell and Churchill up to the time of its fall, and the condition of the shaft in these respects was open to observation when the lease was made, or could have been ascertained by a reasonable examination.

"5. If it had become apparent to the foreman of the proof-room, and to other persons employed on the premises with the plaintiff, that the condition of the shaft had become dangerous, and that it was not safe to pass under it, in season to have warned the plaintiff from passing under it, and if, with ordinary care, the foreman or other persons would or might have warned the plaintiff of the danger, and have prevented her from passing under the shaft and receiving injury from it, the defendant is not liable.

"6. If Rockwell and Churchill were, under their lease, in possession of the stairs and stairway leading from the fourth to the fifth floor of No. 41 Arch Street, under the shaft which fell and injured the plaintiff, and were in control of the use of said

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stairs and stairway, and if it had become apparent to them, or to their servants or workmen, before the injury to the plaintiff, that the condition of the shaft had become such as to make the use of said stairs and stairway unsafe, and they or their servants or workmen might, by the use of ordinary care, have prevented the plaintiff from using said stairs and stairway while so unsafe, and so have prevented the injury to her, then the defendant is not liable.

"7. If, before the injury to the plaintiff, the condition of the shaft which fell and injured her had become such as to render the use of the stairs and stairway under it unsafe, and this was known to the tenants who were in occupation of the premises, or to their servants or workmen, in season to have prevented the plaintiff from passing over said stairs under said shaft and receiving her injury, then the defendant is not liable."

The judge declined so to instruct, except so far as the above requests were embodied in the instructions subsequently given by him; and, after instructing the jury that the defendant, under the terms of his lease to Rockwell and Churchill, was not answerable as owner of the building for the condition of the leased premises, and that the action could not be maintained against him as such owner, submitted the case to the jury upon instructions which permitted them to find for the plaintiff if they should find that the defendant as a furnisher of power merely, and not as owner or lessor, by means of appliances in his building, either by himself or by his servants, was negligent in thus transmitting power or in setting in motion or in operation machinery and appliances actually used by him in the leased premises for the purpose of thus transmitting power. The judge also instructed the jury, with reference to the question of due care on the part of the plaintiff, that no negligence of any other person employed by Rockwell and Churchill in those premises in the matter of an omission to give warning, if they found that there was such an omission, was to be imputed to this plaintiff as her negligence; but the question of due care, or want of due care, on her part, was to be decided by what they should find to have been her own action under the circumstances as they then existed, so far as those circumstances were then known to her.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

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The case was argued at the bar in November, 1890, and afterwards, in September, 1891, was submitted on the briefs to all the judges.

L. S. Dabney & H. Wheeler, for the defendant.

F. E. Snow, (*C. E. Todd* with him,) for the plaintiff.

MORTON, J. The ruling of the court, that, in consequence of the lease to Rockwell and Churchill, the defendant was not liable to the plaintiff by reason of his ownership of the premises was, to say the least, sufficiently favorable to the defendant. We need not consider carefully whether, under the terms of the lease, the shafting, belting, and pulleys, by means of which power was transmitted from the engine in the basement of 41 Arch Street to 39 Arch Street and the building beyond belonging to Mr. Amory, remained in the control of and were to be kept in repair by the defendant, or passed under the demise to Rockwell and Churchill, and were to be kept in repair by them. The plaintiff's case does not depend on that question; but rests on the proposition that the defendant, having undertaken for a consideration to transmit to 39 Arch Street and the building beyond power for the use of the tenants in those buildings, from the engine operated by him in the basement of his own building, was bound to exercise reasonable care to see that the pulleys and shafting which he used for that purpose were in a suitable condition to perform the work for which he was using them, without danger to persons rightfully on the premises, and themselves in the exercise of due care; and that if the defendant, or his servants or agents, were negligent in their use of the shafting and pulleys, or their management of the appliances by which power was transmitted from the engine in the basement of 41 Arch Street, and the plaintiff, being herself in the exercise of due care and rightfully upon the premises, was injured thereby, then she is entitled to recover of the defendant for the injuries so sustained. In this view of the case, it is immaterial whether, under the terms of the lease, Rockwell and Churchill or the defendant were to keep the belting, shafting, and pulleys in repair. If Rockwell and Churchill were to keep them in repair, and did not, still their negligence did not excuse the defendant for the want of due care on his part. It was his duty as an ordinarily prudent man to see that, as against persons

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rightfully on the premises and in the exercise of due care, the shafting and pulleys which he was using were suitable and safe for the purpose, and that the appliances used by him for transmitting power were properly managed by his servants, and he cannot excuse his own want of care or that of his servants by showing that Rockwell and Churchill were bound to keep the shafting and pulleys in repair, and that if they had done so the accident to the plaintiff would not have happened. *Blessington* v. *Boston*, 153 Mass. 409, and cases cited. He used them as they were, and he must be held to have taken the risk attending their use. *Gill* v. *Middleton*, 105 Mass. 477. *Priest* v. *Nichols*, 116 Mass. 401.

These considerations dispose of the second, third, and fourth requests for rulings by the defendant, and also of his objections to the introduction of the evidence by the plaintiff tending to show that the shaft was not sufficiently supported and should have had an additional hanger, that a shelf underneath it would have tended to afford protection and was often placed under shafts similarly located, and that safety would have been promoted by a larger shaft. This testimony bore directly upon the question whether the defendant was justified, as a man of ordinary prudence and care, in using the shaft and pulleys as they were, and was plainly admissible upon that issue. The defendant also objected to the admission of testimony by the plaintiff tending to show that an examination of the broken ends of the shaft was made after its fall, and that there were dark streaks as though there had been a flaw or previous crack in it, and rust extending for one third to one half way through. The objection was put on the ground that it was not admissible under the declaration. But it was clearly allowable under the second count. This count was not demurred to, and though imperfectly drawn, no objection so far as the exceptions show was taken to it at the trial. *Eaton* v. *Fitchburg Railroad*, 129 Mass. 364. The defendant also further objected to testimony on the part of the plaintiff tending to show that after the accident he (the defendant) repaired the stairs where the fall of the shaft broke and damaged them, and caused some wooden sheathing to be placed just under the belt which ran across the room just below the ceiling of the fifth floor; and he objected, after the lease had

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been admitted, to the introduction of testimony that the defendant's engineer oiled the shafting that fell, and the other shafting in the second, third, and fourth floors in 41 Arch Street, and laced the belts on this shafting when necessary, and that Rockwell and Churchill did not take any care of it. But this was all competent for the purpose of showing that the defendant was using and exercising control over the shafting and pulley that fell, for the purpose of transmitting power to 39 Arch Street and the building beyond from his engine in the basement of 41 Arch Street. The vital question in the case was whether the defendant was using and exercising control over the shafting and pulley that fell for that purpose, and this testimony tended to show that he was. *Readman* v. *Conway*, 126 Mass. 374. Whether a portion of it was admitted before or after the lease was introduced could make no difference, and work no harm to the defendant. The lease from the defendant to Rockwell and Churchill could not bar the plaintiff from showing that the defendant was in fact using and exercising control over the shafting, belting, and pulleys for the purpose of transmitting power to other premises. *Gill* v. *Middleton*, 105 Mass. 477.

The defendant asked the court, in the fifth, sixth, and seventh requests which he presented, to rule, in substance, that if Rockwell and Churchill were in control of the stairway, or if they were not, and it had become apparent or known to them or their employees before the shaft fell that it was dangerous to pass under it or to use the stairs, and they knew of this in season to have prevented the plaintiff from passing over the stairs under the shaft, or with ordinary care on their part might have warned and prevented her from passing over the stairs, then the defendant was not liable. The court declined to rule as thus requested, and instructed the jury that no negligence of any employee of Rockwell and Churchill in omitting to give the plaintiff warning was to be imputed to her as her negligence, but the question of her due care was to be determined by her own action under the circumstances that existed, so far as these circumstances were known to her. We think that the court was right in refusing to instruct the jury as requested by the defendant. Neither Rockwell and Churchill nor any of their employees owed to the defendant the duty of warning the plaintiff against the danger.

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Their failure to warn her does not constitute contributory negligence or a want of due care on her part, or relieve the defendant from the consequences of his own carelessness or that of his servants. If the omission of one co-servant to warn another co-servant of an impending danger could be said in any case to be the proximate cause of the injury to the latter, it is sufficient to say that the plaintiff and the other employees of Rockwell and Churchill were not co-servants under the defendant, but under that firm. *Swords* v. *Edgar*, 59 N. Y. 28. *Galvin* v. *Mayor & Aldermen of New York*, 112 N. Y. 223.

The only question remaining is that of due care on the part of the plaintiff, which arises under the first ruling asked for by the defendant, that upon all the evidence the plaintiff was not entitled to recover. The plaintiff was a type-setter, and worked at a frame on the fourth floor, and when she had filled a galley with type, it was her duty to carry it to the fifth floor. She testified that she remembered starting to go up stairs with a galley of type to put it on the press, but remembered nothing more till she found herself in the hospital. It appeared that several of the employees of Rockwell and Churchill noticed a wabbling of the shaft shortly before it fell, and had heard a grating noise from it; and Woods, a foreman in their employ, sent a boy to the engineer to notify him that something was wrong about the shaft, and a few seconds before the shaft fell called out from the top of the stairs on the fifth floor to keep off the stairs. Several persons working near the plaintiff heard him tell the boy to go for the engineer, for the shafting was loose. It did not appear that the attention of the plaintiff was called by any one to the condition of the shaft, or that she heard any remark about it. She was attending to her work, and a want of due care cannot be imputed to her in failing to hear what was not addressed to her. At the time of the injury she was rightfully on the stairs, and no warning was given her specially. There was no reason why she should observe the condition of the shaft and pulleys, and if there had been, it was no more strange that she, with the galley of type in her hands, on which her attention was no doubt fixed, should not have noticed the shaft and pulley, or have heard the warning of Woods, than that Woods, standing at the top of the stairs and watching the shaft, and warning people to keep

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off the stairs, should not have seen her as she was in the act of mounting them. Notwithstanding the blank in the memory of the plaintiff, the circumstances attending the accident were developed sufficiently to enable the jury to pass fairly upon the question of due care on her part, and it was properly left to them to do so. *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379.

Exceptions overruled.

EGBERT C. SMYTH *vs.* VISITORS OF THE THEOLOGICAL INSTITUTION IN PHILLIPS ACADEMY IN ANDOVER.

TRUSTEES OF PHILLIPS ACADEMY *vs.* ATTORNEY GENERAL & others.

Essex. October 14, 15, 1890. — October 28, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Andover Theological Seminary — Visitors — Board of Trustees.

While under the original act (St. 1780, c. 15) incorporating the "Trustees of Phillips Academy at Andover," the trustees are constituted the sole visitors of the corporation, it is not inconsistent with the design of the founders of the Academy that such trustees should accept and manage, under the authority of a legislative act (St. 1807, c. 22), donations for a different but kindred purpose, and permit supervision of their conduct in this department by a board of visitors appointed by the donors.

The visitors of the Andover Theological Seminary, in taking original proceedings to remove a professor therein charged with teaching erroneous doctrines, act in a strictly visitatorial capacity, and the board of trustees of that institution are entitled, if they so desire, to be made a formal party to such proceedings, and to have an opportunity to be heard. (FIELD, C. J., dissenting.)

THE FIRST CASE is an appeal by Egbert C. Smyth, under the St. of 1823, c. 50, § 3, to the full court, from a decree of the Board of Visitors of the Theological Institution in Phillips Academy in Andover, removing the appellant from the office of Brown Professor of Ecclesiastical History in that institution. The second case is a bill in equity filed in this court by the Trustees of Phillips Academy against the Attorney General, and against such visitors as a board and individually, and against the appellant,

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for instructions as to the effect and validity of the decree of the Visitors above referred to. *Field*, J. reserved the second case, on July 10, 1889, for the consideration of the full court. The facts in the two cases, so far as material to the points decided, appear in the opinions.

The cases were argued at the bar in October, 1890, and afterwards, in September, 1891, were submitted on the briefs and printed arguments to all the judges.

C. T. Russell, *T. W. Dwight* (of New York), *& S. E. Baldwin* (of Connecticut), (*W. Gaston & C. H. Barrows* with them,) for the appellant.

E. R. Hoar, *A. French*, *& A. H. Wellman*, for the Visitors.

G. O. Shattuck & J. C. Gray, (*T. H. Russell & R. R. Bishop* with them,) for the Trustees.

KNOWLTON, J. The Theological Institution in Phillips Academy in Andover has a peculiar organization. In 1778 the Academy was founded by Samuel Phillips and John Phillips, "for the purpose of instructing youth, not only in English and Latin grammar, writing, arithmetic, and those sciences wherein they are commonly taught, but more especially to learn the great end and real business of living," and was placed under the control of a board of trustees. On October 4, 1780, this board was incorporated by an act of the State of Massachusetts Bay as "The Trustees of Phillips Academy," with a view to accomplish more successfully the purpose of the original founders. The act provides that these trustees "and their successors" shall "be the true and sole visitors, trustees, and governors of the said Phillips Academy, in perpetual succession forever," and gives them power to make such laws, orders, and rules as to them seem best. They are authorized to receive gifts, and to hold them "on such terms, and under such provisions and limitations, as may be expressed in any deed or instrument of conveyance to them made," provided that the condition of the grant or donation does not require them "to act, in any respect, counter to the design of the first grantors, or of any prior donation." St. 1780, c. 15, § 5, 5 Prov. Laws, (State ed.) 1418. By the last will of John Phillips, proved and allowed on April 18, 1795, one third of the residue of his property was given to the Trustees of Phillips Academy, "for the benefit more especially of charitable scholars"; and it was

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provided that those who expected to become clergymen might be assisted in the study of divinity by "some eminent Calvinistic minister of the Gospel." By the St. of 1807, c. 22, the corporation is authorized to hold "for the purpose of a theological institution, and in furtherance of the designs of the pious founders and benefactors of said academy," real and personal estate, the income of which is to "be always applied to said objects, agreeably to the will of the donors, if consistent with the original design of the founders of the said academy." Afterwards, in the same year, Phœbe Phillips and others established and endowed "a public theological institution in Phillips Academy," on the condition that it "be accepted by the trustees aforesaid, and that it be forever conducted and governed by them and their successors in conformity to" certain "general principles and regulations," which they unitedly adopted as the constitution of the institution. Under this constitution and the preceding legislative act of the same year, the theological institution became a department of Phillips Academy, the management and control of which were in the corporation, under regulations or statutes which were set out at length in the instrument creating it. The trustees were charged with the duty of conducting the institution in conformity with the wishes of the donors as expressed in these regulations, and elaborate provisions were made prescribing methods of management. At the same time, certain visitatorial powers were reserved to the founders in Article 32 of the instrument, which is as follows: "Notwithstanding this seminary is placed by this constitution under the immediate care and government of the Trustees of Phillips Academy, it is always to be understood, and it is hereby expressly declared, that every founder of a professorship, scholarship, or any other living whatever in this institution, will have the exclusive right of prescribing the regulations and statutes to be observed by the said trustees in conducting the concerns of the same, said regulations and statutes being always consistent with the principles and object of this institution; and also the right, for the term of his life, of appointing in the original deed or grant such local visitor or visitors as he may think proper, and to endow him or them with all visitatorial powers and authorities necessary to secure and enforce due observance

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and execution of his said regulations and statutes." This was the original foundation of the Theological Institution in Phillips Academy.

In 1808, Moses Brown and others gave a fund of forty thousand dollars to the corporation, the income of which is to be applied to the maintenance of two professors in the theological institution, and by certain elaborately drawn instruments they prescribed the terms on which the gifts were made, and the manner in which they were to be used. These gifts were accepted by the trustees, and the regulations for the management of them are entitled "The Statutes of the Associate Foundation in the Theological Institution in Andover," or "The Associate Statutes." In May, 1808, in pursuance of a power reserved by them in the original constitution, the original founders, Phœbe Phillips and others, by additional regulations, brought the original statutes into conformity with the associate statutes in all important particulars.

In general character the statutes of the associate foundation differ but little from the original statutes. They leave the whole management and control of the theological institution in the board of trustees, who constitute the corporation, and who hold the property, subject only to a visitatorial power in the board of visitors, whose general duty is to visit the corporation and see that the trustees manage the institution in conformity with the statutes, and, if errors or abuses are discovered, to correct them; and subject also to a right and duty on the part of the visitors to take original supervisory action in two or three matters in the management, as in the examination of professors prior to their inauguration, and in the approving or negativing the election of a professor by the trustees, and in appointing a standing committee to ascertain the qualifications of applicants for admission to the seminary.

The first part of Article 12 of the associate statutes is as follows: "That the trust aforesaid may be always executed agreeably to the true intent of this our foundation, and that we may effectually guard the same in all future time against all perversion, or the smallest avoidance of our true design as herein expressed, we, the aforesaid founders, do hereby constitute a board of visitors to be, as in our place and stead, the guardians,

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overseers, and protectors of this our foundation in manner as is expressed in the following provisions," etc. By Article 20 it is provided that "the power and duties of the board of visitors thus constituted and organized shall be as follows, namely: to visit the foundation once in every year, and at other times when regularly called thereto; to inquire into the state of this our fund, and the management of this foundation, with respect both to professors and students; to determine, interpret, and explain the statutes of this foundation in all cases brought before them in their judicial capacity; to redress grievances, both with respect to professors and students; to hear appeals from decisions of the board of trustees, and to remedy, upon complaint duly exhibited, in behalf of the said professors or students; to review and reverse any censure passed by said trustees upon any professor or student on this foundation; to declare void all rules and regulations made by the said trustees relative to this foundation which may be inconsistent with the original statutes thereof; to take care that the duties of every professor on this foundation be intelligibly and faithfully discharged, and to admonish or remove him either for misbehavior, heterodoxy, incapacity, or neglect of the duties of his office; to examine into the proficiency of the students, and to admonish, suspend, or deprive any student for negligence, contumacy, or any heinous crime committed against the laws of God or the statutes of this foundation; and, in general, to see that our true intentions as expressed in these our statutes be faithfully executed; always administering justice impartially, and exercising the functions of their office in the fear of God, according to the said statutes, the constitution of this seminary, and the laws of the land."

The powers and duties of the trustees in regard to the affairs of the corporation remain as prescribed by the original act of incorporation and the amendatory act, and by the original constitution of the theological institution, except so far as they are abridged or modified by the associate statutes.

We have before us two cases, — one the appeal of Egbert C. Smyth from the decree of the Visitors of the Theological Institution in Phillips Academy in Andover, removing him from his office as Brown Professor of Ecclesiastical History, the other a bill in equity, brought by the Trustees of Phillips Academy

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against the Attorney General and others, asking for the determination and instruction of the court in regard to the validity of the above mentioned decree of the visitors.

It is contended by the appellant in the former case, and by the plaintiff in the latter case, that the provision for a board of visitors in the associate statutes is inconsistent with the act of incorporation of the Trustees of Phillips Academy, and invalid, and that the statute of 1823, c. 50, incorporating the board of visitors, is unconstitutional and void. We are of opinion that this contention is not well founded. While by the original act the trustees are constituted the sole visitors of the corporation, we think it is not inconsistent with the design of the founders of the academy that they should accept and manage, under the authority of a legislative act, donations for a different but kindred purpose, and should permit supervision of their conduct in this department by a board of visitors appointed by the donors. The validity of these statutes, and of the act incorporating the board of visitors, seems to have been settled by adjudications of this court. *Phillips Academy* v. *King*, 12 Mass. 546. *Murdock, appellant*, 7 Pick. 303. *Murdock* v. *Phillips Academy*, 12 Pick. 244.

At the hearing before the board of visitors on the complaint of J. W. Wellman and others against Egbert C. Smyth and four others, professors in the theological seminary in Andover, upon which complaint the decree appealed from is founded, the trustees applied for leave to appear and be heard as a party, and their application was rejected. Again in this court the trustees have asked to be heard in that suit; and they contend that the decree of the visitors should be set aside because it was made without hearing them, and they make a like contention and argument in their suit in equity. The question which they present involves an inquiry into the nature of visitatorial proceedings in general, and into the relations of the visitors to the managing board of the corporation under the statutes of the founders of the theological institution in Phillips Academy.

The nature of the duties of visitors of educational or charitable institutions is to some extent implied in the name which these officers bear. They are to visit the corporation. They are to go where it is, and see it and its representatives face to face.

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2 Kent Com. (13th ed.) 302. *The King* v. *Bishop of Ely*, 1 Wm. Bl. 71, 82. *Eden* v. *Foster*, 2 P. Wms. 325. Their visitation is for the purpose of inquiring into its condition, and ascertaining whether it is properly or improperly managed, and whether in all respects it is conducted according to the principles of its foundation. A visitation may be general or special; and under most English foundations, to protect the managing board from too frequent interference, a general visitation can only take place at the expiration of a certain interval, as one, three, five, or ten years. Following this theory, the Andover statutes prescribe that general visitations shall be once in a year. Associate Statutes, Art. 20. A special visitation may be made at any time at the request of the governing body, or of any one claiming a grievance against it, and who on that account has a right to promote the office of the visitors. When special duties are imposed on the board of visitors by the founder, the visitors may perform them at such times as required by the statutes which confer their authority. Ordinarily at a special visitation the managing body of the institution is necessarily a formal party before the visitors, because the visitation proceeds on a formal application by the managers, or by some one asking relief against them. When questions arise at a general visitation, whatever the form of the proceedings, the real party whose conduct is on trial is the managing board, by reason of whose act or omission the institution is alleged to have gone astray. Although the visitors are not a court, in the performance of some of their duties they act judicially, and they must be governed by the will of the founder as expressed in his statutes. It is a fundamental principle of all judicial proceedings that one whose conduct is called in question shall be heard in his defence, and this principle is as important in its application to the managing board of a charitable corporation whose acts or omissions are under investigation by a board of visitors as to an individual charged with the commission of a crime. *Murdock, appellant*, 7 Pick. 303. *Murdock* v. *Phillips Academy*, 12 Pick. 244. It is inconceivable that a board of visitors intending to be governed by principles of justice should for a moment think of refusing the managing body a hearing in a case where the proceedings are directly against it to set aside its action. But it should not be forgotten

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that almost everything which comes within the jurisdiction of a board of visitors acting under their general visitatorial power involves a trial of the managing board, and the jurisdiction of the visitors to deal with the agents or servants or individual beneficiaries of the institution is, ordinarily, merely incidental to their jurisdiction over the institution itself as represented by its managing officers. If by the statutes they are given express authority to act in a visitatorial capacity in regard to an agent, their action may no less directly affect the institution itself. The form of the proceeding is immaterial; if the visitors are in fact seeking to revise the action of the managers by virtue of their supervisory power, the managers should have an opportunity to be heard.

So far as the industry of counsel on either side has furnished us with authorities, we have found nothing to indicate that visitations of educational or charitable institutions, under foundations like that which we are considering, have ever been had without notice to the managing board. In some relations, under the ecclesiastical system in England, the bishop has visitatorial power of a different kind, which we need not consider; but in institutions like the theological department of Phillips Academy the right of the managing board to be heard before the visitors in every proceeding affecting the corporation seems to have been always assumed. In *The King* v. *Bishop of Ely*, 2 T. R. 290, 336, 338, 345, in considering the question whether a visitor acted in his official capacity, Ashhurst, J. said: "But even supposing that this matter was within the bishop's visitatorial authority, yet he has not acted in the character of a visitor. The exercise of a visitor's power, in a case like the present, is a judicial act; and a judge cannot determine without hearing the parties concerned. So that even if he had the right to exercise such a power, he should have done it in a formal manner, and should at least have convened the parties interested, to give them an opportunity of making a defence." Buller, J. used the following language: "His proceedings therefore have not even the show of a visitation; for whenever that is intended, the parties whose conduct or whose rights are objected to should be heard or at least convened before him, and have an opportunity of being heard; but in the present instance this ceremony was totally omitted."

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Grose, J. said: "Neither did he himself conceive that he was acting as visitor; his acts show that he was not; and he acted without giving notice to the persons on whom he was judging." Not only is this language applicable in terms to the governing board of a corporation whose conduct is called in question, but the facts of that case show that the judges had reference to the governing board of Peterhouse College, to whose action the controversy related. In those cases under royal charters, where the visitatorial power is in the King, visitatorial proceedings in regard to the management of the affairs of the corporation have been conducted before the Lord Chancellor, who has observed the same rules as to bringing before him all parties interested as in ordinary cases in chancery; and every reason that exists in any case why parties interested in a proceeding should have a right to be heard applies in cases like the present.

The counsel for the trustees asserted at the argument that it had been the universal practice in England for visitors to give notice and an opportunity of being heard to the managing body before making a decree affecting the management of an eleemosynary institution, and they offered to present affidavits showing the result of extended researches in regard to the subject; but, the respondents objecting, and the facts not being regularly before us as evidence, we have considered only such cases as appear in the reports or come within general historical knowledge. These indicate that the practice in England has been as contended by the trustees. *Philips* v. *Bury*, 2 T. R. 346; *S. C.* 1 Ld. Raym. 5. *The King* v. *Bishop of Ely*, 2 T. R. 290. *Attorney General* v. *Dixie*, 13 Ves. 519. *Attorney General* v. *Earl of Clarendon*, 17 Ves. 491.

It cannot be maintained that the visitors are the corporation that holds the property and is primarily responsible for the affairs of the seminary, or that they sufficiently represent the corporation when sitting as judges. They are incorporated as a separate board, and are the judicial department of the theological institution. They are not supposed to be familiar with the details of the business of the principal corporation, nor to understand the practical effect of many things in its management. They do not represent the corporation as an administrative board, and at a hearing in regard to the management

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of its affairs they would ordinarily need the aid of facts, suggestions, and arguments which the managers alone could properly present. Besides, while they act as judges, they are not in a position to defend ardently and vigorously acts of the corporation which might be unjustly and vigorously attacked by others.

It is a mistake to treat a proceeding before the visitors to remove five of the professors of an institution like the Theological Seminary at Andover as a suit against the professors alone. If they are wrongly there, the trustees should have removed them. The proceedings look to a change which would be likely to concern very deeply the interests of the seminary. Can it be said that the officers of the corporation who have been charged with its management in the past, and who will be held responsible for its condition in the future, are not interested in a matter so vitally affecting it? Shall the officers of the corporation in such a case be forced to keep silence, and trust to professors whose opinions or teachings are criticised to protect the interests of the corporation? Suppose a learned professor, with mistaken self-respect, should refuse to defend himself at all under accusations in regard to the character of his teachings, must the trustees run the risk of losing his valuable services for want of a proper presentation of the truth at the hearing before the visitors? Even if he is willing to do what he can in his own defence, shall the managing body of the corporation be refused an opportunity of presenting in their own way considerations which they deem vital to the welfare of their institution, which the professor might overlook, or present but feebly?

The statutes of the Theological Seminary at Andover are of a character to emphasize the considerations which are generally applicable in cases of this kind. Article 14 of the original statutes of the seminary is as follows: "Every professor in this institution shall be under the immediate inspection of the said trustees, and by them removed agreeably to the will of his founder for gross neglect of duty, scandalous immorality, mental incapacity, or any other just and sufficient cause." Under the associate statutes this article is left in full force. *Murdock, appellant*, 7 Pick. 303. *Murdock* v. *Phillips Academy*, 12 Pick. 244. Except in the appointment of a standing committee to ascertain the qualifications of applicants for the advantages of the seminary,

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and in the revision of the action of the trustees in the election of professors, the powers and duties of the board of visitors, as prescribed in Article 20 above quoted, are strictly visitatorial, and the provisions of the original act of incorporation of Phillips Academy and the additional act of 1807, and of the original constitution of the theological institution, primarily put upon the trustees the entire responsibility for the management of the seminary. The associate statutes are engrafted upon the original statutes and the acts of the Legislature, and are to be considered with them. The power and duty to remove a professor who teaches doctrines contrary to the statutes is in the trustees, and if they see fit not to remove one who is charged with teaching erroneously, the visitors may take original proceedings for that purpose. But we are of opinion that in such a case the statutes require that the trustees should be heard, if they desire, as they would be on an appeal from their own order of removal or refusal to remove in proceedings before themselves. In the present case the trustees were not heard before the visitors, although they made a formal application for leave to become a party at the trial. The action of the visitors in this particular is subject to revision by the Justices of this Court, who are expressly given authority, under Article 25 of the associate statutes, to set aside any decree which they deem contrary to the statutes, or beyond the just limits of the power of the visitors. By Article 20 the visitors are required to administer justice impartially, and exercise the functions of their office "according to the said statutes, the constitution of this seminary, and the laws of the land." We do not intimate that visitors, in determining questions before them, are to be held to all the rules and formalities which would be observed by a court of law under similar circumstances, nor that their action can ordinarily be revised by a court in the absence of an express provision to that effect in the statutes, unless it so affects a charity that a court of equity ought to interfere under its jurisdiction for the protection of trusts. But where a principle essential to a fair and proper adjudication of the rights of parties is disregarded in deciding a question, their action under statutes like those before us is invalid.

On questions so difficult that the members of the board of visitors were divided in opinion at the close of the hearing, we

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cannot say in the present case that a different result might not have been reached if the trustees had been heard. In this view of the subject, it becomes unnecessary to consider many of the questions which were argued before us. The mistake of the visitors seems to have been in failing to appreciate that their functions in this hearing were merely visitatorial, and that they could not, as an administrative body, represent the interests and present the cause of the corporation whose conduct was on trial before them.

For these reasons we are of opinion that the action of the visitors was not in accordance with the statutes which they were trying to maintain, and that their decree must be set aside.

From the views already expressed, it follows that the record of the board of visitors should be amended, as requested by the appellant in the eighth particular of his suggestions for the diminution of the record, so as to show the proceedings in reference to the application of the board of trustees to appear and be heard before the visitors.

The application of the Trustees of Phillips Academy to be heard before us as a party in the original suit having been granted, their bill in equity is dismissed without prejudice.

Decrees accordingly.

FIELD, C. J. I dissent from that part of the opinion of the court which holds that the decree of the visitors should be set aside on the ground that the trustees as a corporation were not formally made a party to the proceedings before the visitors. It is immaterial whether or not the application of the trustees to be permitted to appear as a party, and the refusal of the visitors, are a part of the record of the visitors, because the record, even if this application and this refusal be excluded from it, does not show that the trustees as a corporation were cited to appear, or did appear, in the proceedings. It is abundantly evident that Professor Smyth, as well as the complainants, was represented before the visitors by learned counsel, and that both the prosecution and the defence were conducted with great thoroughness and ability, so that justice does not require that the decree be set aside on the ground that the trustees were not made a party, unless, as strict matter of law, it was indispensably necessary

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to make them a party in order that the visitors might acquire jurisdiction to hear and determine the matter of the complaint. Professor Smyth in the complaint was charged with heterodoxy, if he was charged with anything that could justify the decree. It is conceded by the majority of the court that the visitors had original jurisdiction to hear and determine the complaint. The visitors have been made a corporation by the St. of 1823, c. 50, passed on January 17, 1824, and by that act are empowered, in § 1, to "do and perform all acts and things required of them by" the statutes of the founders, and this court by the same act is authorized, in § 3, "to declare null and void any decree or sentence of the visitors" which may be considered "contrary to the statutes of the founders, and beyond the just limits of the power prescribed to them thereby." Both the visitors and this court are acting under this special statute of 1823, c. 50. The question is whether there is anything in the associate statutes of the founders of the theological institution, subject to which Professor Smyth holds his office, that in a proceeding of this kind absolutely requires the trustees to be made a party.

In considering this, it is necessary to inquire particularly into the powers and duties of the visitors under the associate statutes. The act of the State of Massachusetts Bay, passed October 4, 1780, incorporating the Trustees of Phillips Academy in Andover, made its trustees the sole visitors, and prescribed that the number of the trustees should be not more than thirteen nor less than seven, that the principal instructor for the time being should be one of them, that a major part should be laymen and respectable freeholders, and also that a major part should consist of men not inhabitants of the town where the seminary was situated. St. 1780, c. 15, 5 Prov. Laws, (State ed.) 1418. No religious or theological test of any kind was prescribed as a qualification for the office of trustee.

By the original statutes of Phœbe Phillips and others who were the founders of the Theological Institution in Phillips Academy, and by the associate statutes of Moses Brown, William Bartlett, and John Norris, and by the additional statutes of the original founders, an entirely new visitatorial scheme was established for the theological institution. The associate statutes, subject to which Professor Smyth holds his office of Brown

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Professor of Ecclesiastical History, prescribed a creed of theological doctrine to be taught in the institution, and required every professor on the associate foundation, "after a careful examination by the visitors with reference to his religious principles," to "publicly make and subscribe a solemn declaration of his faith in divine revelation, and in the fundamental and distinguishing doctrines of the Gospel as expressed in the following creed," etc., and then follows a long and carefully prepared creed.

Article 3 is as follows: "The preceding creed and declaration shall be repeated by every professor on this foundation at the expiration of every successive period of five years; and no man shall be continued a professor on said foundation who shall not continue to approve himself a man of sound and orthodox principles in divinity agreeably to the aforesaid creed." According to Article 6, the professors are to be chosen by the trustees, and the "choice presented to the visitors for their approbation," and, "if this choice be negatived, another election shall in like manner be presented, and, *toties quoties*, till an election be made which shall be approved by the visitors." Article 12 is as follows: "That the trust aforesaid may be always executed agreeably to the true intent of this our foundation, and that we may effectually guard the same in all future time against all perversion or the smallest avoidance of our true design, as herein expressed, we, the aforesaid founders, do hereby constitute a board of visitors to be, as in our place and stead, the guardians, overseers, and protectors of this our foundation. . . . And it is farther expressly provided, that the perpetual board of visitors first herein named shall consist of two clergymen and one layman, all of whom shall be men of distinguished talents and piety." By Article 13 it was provided that no person should be eligible as a visitor under the age of forty years; and, with the exception of the original visitors, a visitor ceases to hold his office when he completes his seventieth year. By Article 14 the board was to meet every year at the aforesaid theological institution to execute the business of their appointment; and "also, upon emergencies, when called thereto, as hereinafter directed." By Article 19 it was provided that every visitor, before taking his seat at the board, should make and

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subscribe a declaration as follows: "Approving the statutes of the aforesaid theological institution, and those of the associate founders, I solemnly declare, in the presence of God and of this board, that I will faithfully exert my abilities to carry into execution the statutes of the said founders, and to promote the great object of the institution." Every visitor was also required to subscribe "the same theological creed which every professor elect is required to subscribe, and a declaration of his faith in the same creed shall be repeated by him at every successive period of five years."

The powers and duties of the board of visitors thus constituted and organized were set forth in Article 20, which is as follows: "The power and duties of the board of visitors thus constituted and organized shall be as follows, namely: to visit the foundation once in every year, and at other times when regularly called thereto; to inquire into the state of this our fund, and the management of this foundation, with respect both to professors and students; to determine, interpret, and explain the statutes of this foundation in all cases brought before them in their judicial capacity; to redress grievances, both with respect to professors and students; to hear appeals from decisions of the board of trustees, and to remedy, upon complaint duly exhibited, in behalf of the said professors or students; to review and reverse any censure passed by said trustees upon any professor or student on this foundation; to declare void all rules and regulations made by the said trustees relative to this foundation which may be inconsistent with the original statutes thereof; to take care that the duties of every professor on this foundation be intelligibly and faithfully discharged, and to admonish or remove him either for misbehavior, heterodoxy, incapacity, or neglect of the duties of his office; to examine into the proficiency of the students, and to admonish, suspend, or deprive any student for negligence, contumacy, or any heinous crime committed against the laws of God or the statutes of this foundation; and, in general, to see that our true intentions, as expressed in these our statutes, be faithfully executed, always administering justice impartially, and exercising the functions of their office in the fear of God, according to the said statutes, the constitution of this seminary, and the laws of the land."

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Article 22 is as follows: "The visitors shall appoint a standing committee to ascertain the qualifications of applicants for the advantages of this foundation. Those whom they approve may be recommended for admission as resident applicants on trial for two months; and if at the expiration of this term the faculty approve them, they may be placed on the list of resident students till the next annual meeting of the visitors. And if, upon examination by the board of visitors, they be then approved, they shall be registered as associate students; but if not approved by the visitors, after careful examination and the best information respecting them, they shall be dismissed from the foundation." Article 26 is as follows: "Every annual meeting of the board of visitors shall be introduced with prayer, after which these statutes shall be read by the president."

I do not propose to inquire how far Moses Brown and William Bartlett and John Norris in establishing these statutes adopted the original statutes of the institution established by Phœbe Phillips and others, or to discuss any differences that may be suggested between the original statutes of the institution as modified by the additional statutes of the original founders and the associate statutes. I assume, without considering it, that the Brown Professor of Ecclesiastical History, holding his office as I understand under the associate statutes, might be removed from his office by the trustees, acting under Article 14 of the original statutes of the theological institution, "for gross neglect of duty, scandalous immorality, mental incapacity, or any other just and sufficient cause," and that heterodoxy is a just and sufficient cause. Still it is evident that for the protection of the institution from heterodoxy Moses Brown and his associates relied mainly upon the board of visitors established by them. The board of visitors was to be composed ultimately of two clergymen and one layman of distinguished talents and piety, in the prime of life, who were to read or to listen to the reading of the statutes every year, and who, before taking their seat at the board, were required to declare their faith in the creed prescribed by these statutes, and to repeat this declaration of faith every five years. They were required to examine the persons proposed for professors, with reference to their religious principles, and to examine the applicants for admission as students, and to approve or reject both

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professors and students. The trustees might be of any or no theological belief, and a majority of them must be laymen, and no qualifications were required which would enable them to decide intelligently theological questions. It is manifest that the associate founders were unwilling to trust the management of their foundation on its theological side to the trustees. Accordingly, the associate statutes gave the visitors established by them not only general visitatorial powers, but special powers, both original and appellate, and it is in the exercise of one of these special powers that the visitors acted in the present case. No question arises in the case of the incidents of general visitatorial powers. So far as the visitors may attempt to supervise the action of the trustees, justice may require that the trustees should have notice and an opportunity to be heard. So far as the visitors are authorized "to hear appeals from decisions of the board of trustees," that board would be in a sense a party, as their record must be produced before the visitors, and as the trustees might be the prosecutors as well as judges, the trustees might have an interest in maintaining the propriety of their action.

But the duty imposed on the visitors "to take care that the duties of every professor on this foundation be intelligibly and faithfully discharged, and to admonish or remove him, either for misbehavior, heterodoxy, incapacity, or neglect of the duties of his office," as well as the duty "to examine into the proficiency of the students, and to admonish, suspend, or deprive any student for negligence, contumacy, or any heinous crime committed against the laws of God or the statutes of this foundation," is a duty directed, not against the trustees, but against the professors and students, and is one that must be performed by the visitors according to their own judgment, and not according to the judgment of the trustees. It is an original, and not a supervisory power. The complaint of Mr. Wellman and others against Professor Smyth, filed with the visitors, charged no maladministration on the part of the trustees; and the conduct of the trustees was not in any way involved in the proceedings. It was the primary duty of the visitors to entertain the complaint, if it seemed to them to require consideration. The visitors, in determining the matter of the complaint, could render no decree

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or judgment against the trustees. If the trustees, as a corporation, had been cited to appear, it is difficult to see in what capacity they would appear in the proceedings, whether for the prosecution or the defence, or sometimes for one and sometimes for the other. If Professor Smyth had pleaded that he was guilty of the charges and specifications, could the trustees have pleaded that he was not guilty, or if he had pleaded that he was not guilty, could the trustees have pleaded that he was guilty? If the trustees are made a party, what is or can be the issue tried between them and the complainants, or between them and Professor Smyth? Suppose Professor Smyth had admitted in evidence before the visitors that the doctrines he taught were inconsistent with the creed established by the associate founders in manner and form as charged, and had consented to be removed from his office, or had asked leave to resign his office, could the trustees have prevented it?

There may be some embarrassment on the part of the trustees after Professor Smyth has been removed from his office by the visitors pending an appeal to this court. If the court affirms the decree, then he is removed from office, as of the date of the original decree; if the complaint is dismissed, or the decree is set aside, then he remains a professor until he dies, resigns, or is removed from office by a new decree. But the status of Professor Smyth pending an appeal to this court, if he is removed by the visitors, is a consequence of the action of the visitors, and the embarrassment of the trustees arises not during the trial, but only after the visitors have determined the matter of the complaint. The relation of the trustees to Professor Smyth after the decree of the visitors pending an appeal to this court is the same, whether they have been admitted as a party to the original proceedings or not. The same embarrassment arises in every case where one body has the power of removing an officer and another body pays him his salary while he holds his office. It arises in most ecclesiastical trials. It arises in the case of the policemen of Boston appointed by the board of police, who may be removed by the board, but while they continue in office are paid by the city. It was never supposed that the city of Boston was a necessary party to a complaint against a policeman before the board of police. *Ham* v. *Boston Board of Police*, 142 Mass.

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90. In the present case the visitors are a special tribunal under the statutes of the associate founders and the statute of the Commonwealth for the trial of Professor Smyth on such a complaint as was made in this case. Professor Smyth had the rights of any incumbent of an office who can only be removed for cause, and these are defined in *Murdock* v. *Phillips Academy*, 12 Pick. 244, 262. The trustees were not the prosecutors. The members of the board of trustees, if they knew anything of the matters charged, could be called as witnesses, but the conduct of the trustees as a corporation was not involved in the proceedings, and the opinion of this corporation on the truth or falseness of the charges, or whether, if true, they constituted heterodoxy, could not lawfully be used to influence the judgment of the visitors. Even if the opinion of the trustees, which would regularly be shown by a vote, could be received for this purpose, it would be competent as evidence, but the competency of such evidence would not require that the trustees be made a party. If this were an appeal from the decision of the trustees, the opinion of that board could not lawfully be used to affect the judgment of the visitors. This is the general rule in proceedings on appeal. "They [the visitors] are bound, on appeal, to hear the cause *de novo* and without any regard to antecedent steps, except that the cause shall be regularly brought before them." *Murdock, appellant*, 7 Pick. 303, 328, 329. *A fortiori*, when the visitors take original jurisdiction of a complaint, the opinion of the trustees who never heard the complaint cannot be admissible.

I think that the appeal cannot be disposed of on the ground that the trustees were not made a party to the proceedings before the visitors, and that it should be considered on its merits, so far as under the St. of 1823, c. 50, this court is authorized to consider it. I refrain from expressing any opinion on the merits, because there may be a new trial of the complaint by the visitors, and another appeal to this court.

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SUSIE E. ALLYN *vs.* DAVID L. ALLYN.

Hampden. September 24, 1891. — November 6, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Agreement for Sale of Real Estate — Insurance — Equity — Specific Performance.

The owner of land with buildings thereon agreed with a purchaser, who was to pay for it in instalments, to give him possession of the same, and upon complete payment to convey it to him, "his heirs or assigns," and meanwhile to keep the premises insured for the purchaser's benefit, it being understood between them that insurance already procured by such owner for his own benefit fulfilled such requirement. After such possession and part payment the buildings were destroyed by fire, and the purchaser assigned all his rights under the agreement to a third person. *Held*, that no condition was to be implied that the performance of the agreement was dependent upon the continued existence of the buildings; and that the assignee could enforce its performance in equity in his own name, and recover the full value of the property destroyed up to the amount of the insurance, less any balance due such owner under the agreement.

BILL IN EQUITY, filed in the Superior Court, to enforce an agreement entered into on April 3, 1888, between the defendant, described as of Montgomery, as the party of the first part, and Charles N. Stimpson, as the party of the second part, as follows: "The party of the first part hereby agrees to sell, and the party of the second part to purchase, a certain estate, situate in said Montgomery, and bounded as follows, to wit, [here followed a description of the estate in question,] and contains about seven eighths of an acre, buildings thereon also included. Party of second part to have possession of said premises May 1st next, and to pay party of first part the sum of six hundred dollars for said described premises; and of said sum has paid fifty dollars down, and agrees to pay the sum of fifty dollars on the first day of May next, and one hundred dollars annually thereafter, till the whole sum is paid, with interest annually on the whole sum unpaid. Party of first part to keep said premises insured for the benefit of party of second part, as his interest may appear; and if party of second part leaves the house vacant at any time, he is to pay for all extra insurance, and party of second part to pay all taxes assessed on said premises. Upon the pay-

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ment of all sums that shall be due, with interest as aforesaid, the party of first part hereby agrees to convey the above described premises to the said Stimpson, his heirs or assigns, by good and sufficient deed of warranty in usual form, free of all incumbrances. This agreement is a duplicate."

The bill alleged that, on April 3, 1888, Stimpson paid the defendant, pursuant to the above agreement, the sum of fifty dollars, and on May 1 following the further sum of fifty dollars; and on the date last named entered into possession of the premises described in the agreement; that after Stimpson had made improvements on the buildings during that and the following month to the value of one hundred dollars, the buildings were totally destroyed by fire on June 18, 1888, being then valued, as on April 3, 1888, at eight hundred dollars; that on March 4, 1889, Stimpson duly assigned his rights in the agreement to the plaintiff, who herself entered into possession of the premises; that the defendant had refused on demand to pay, first to Stimpson and then to the plaintiff, the difference between that sum and what was due the defendant from Stimpson, or to convey the land to either; that before April 3, 1888, the defendant had insured the buildings for eight hundred dollars, for his own benefit, for a term ending in 1891, of which Stimpson was informed when the agreement was made; that Stimpson and the plaintiff had paid all the taxes assessed on the premises since the agreement was made; and that immediately after the fire the defendant, without consulting with Stimpson and without his knowledge, adjusted the loss with the insurance company, and accepted from it as full indemnity the sum of six hundred dollars, and surrendered the policy to the company.

The prayer of the bill was that the defendant might be ordered to execute and deliver to the plaintiff a good and sufficient warranty deed of the land free of incumbrances, and to pay to her so much of said sum of eight hundred dollars as was not needed to discharge Stimpson's obligations to the defendant under the agreement.

At the hearing, before *Maynard*, J., it was admitted, in addition to the facts set out in the bill, that the defendant before the assignment by Stimpson tendered to him the difference between what Stimpson owed the defendant and the amount of

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the insurance received by the defendant, which Stimpson refused to accept, but demanded the sum of two hundred dollars in addition thereto, and a deed of the land. It was admitted that the buildings made up the chief value of the premises, and that the land after the fire was only worth about fifty dollars. The judge found that, when the agreement was entered into, it was understood by the parties thereto that the insurance of eight hundred dollars already procured by the defendant sufficiently fulfilled the defendant's agreement to keep the buildings insured for the benefit of Stimpson.

The judge ordered a decree to be entered for the plaintiff, as indemnity for the loss of the buildings, not exceeding the sum of eight hundred dollars, less the balance of the purchase money due the defendant under the agreement, with interest; and the defendant appealed to this court.

J. L. Rice, for the plaintiff.

H. W. Ely & C. F. Ely, for the defendant.

MORTON, J. We think the decree in this case should be affirmed. It is evident from the agreement that the parties contracted with reference to the possibility that the buildings might be destroyed by fire. They expressly agreed as follows: "Party of first part [the defendant] to keep said premises insured for the benefit of party of second part, as his interest may appear; and if party of second part leaves the house vacant at any time, he is to pay for all extra insurance." The report states that, at the time the agreement was entered into, it was understood by the parties that the insurance of eight hundred dollars, which the defendant had procured in his own name, sufficiently fulfilled his agreement to keep the buildings insured for the benefit of Stimpson, the other party to the contract. The parties having in their contract, and by their acts, provided relative to the destruction of the buildings by fire, the happening of that event can furnish no excuse to either party for refusing to carry out the agreement. In such a state of things, no condition can be implied that the performance of the contract is dependent upon the continued existence of the buildings. The reasoning of the cases in which it has been held that both parties were excused from performance by the destruction before a breach of that which constituted an important part of the contract, but con-

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cerning whose destruction there was no provision in the contract, does not apply. See *Wells* v. *Calnan*, 107 Mass. 514.

It follows that the defendant was not relieved from the performance of his contract by the fact that the buildings had been destroyed. That being so, it was for the plaintiff to elect whether she would pursue her remedy at law for damages for the breach of contract, or whether she would bring a bill in equity to compel performance of the contract. *Cunningham* v. *Hall*, 4 Allen, 268. *Woodbury* v. *Luddy*, 14 Allen, 1. *Davis* v. *Parker*, 14 Allen, 94. She has elected the latter, and the question is to what is she entitled from the defendant. She is entitled in the first place to a warranty deed of the land in the usual form, free from all incumbrances, upon payment of all sums due to the defendant; that is what the agreement calls for. She sets up in her bill that she has offered to pay what is due, or, what is the same thing, has offered to allow the defendant to retain it from the proceeds of the insurance, and we do not understand that the defendant objects to the sufficiency of her offer, or of that which Stimpson had previously made.

In the next place, upon the execution of the agreement, Stimpson, her assignor, acquired an insurable interest in the property to the extent of its full value. *Strong* v. *Manufacturers' Ins. Co.* 10 Pick. 40. *Gilman* v. *Dwelling-House Ins. Co.* 81 Maine, 488. *McGivney* v. *Phœnix Ins. Co.* 1 Wend. 85. *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 385. *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. 25. The contract provided that the defendant should keep the premises insured for Stimpson's benefit as his interest might appear, and at the time the agreement was entered into it was understood by Stimpson and the defendant that an insurance of eight hundred dollars, which the defendant had in his own name, sufficiently complied with the provision as to insurance in favor of Stimpson. The defendant thenceforth held the policy for the benefit of Stimpson and his heirs or assigns, and had no right without their consent to make the settlement which he did; and he cannot now relieve himself by virtue of that settlement from liability to the plaintiff under his agreement to keep the premises insured, but is liable for the full value of the property destroyed up to eight hundred dollars, which the parties in substance agreed should be the limit of the insurance. *Peabody* v. *Tarbell*, 2 Cush. 226.

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Lastly, the defendant objects that Stimpson could not assign, without notice to the defendant, his interest in the insurance, and that the plaintiff cannot maintain any suit at law or in equity relating to the same. But it is clear that the contract and all the rights which it gave Stimpson could be assigned by him to the plaintiff, and that she can maintain a bill in equity thereon in her own name to enforce its performance, the assignment being an absolute and unconditional one, and Stimpson having no rights or liabilities in or under the contract. *Hodges* v. *Saunders*, 17 Pick. 470. *Murphy* v. *Marland*, 8 Cush. 575. *Currier* v. *Howard*, 14 Gray, 511. *Decree affirmed.*

ANNE W. TUCKER & others *vs.* JASPER L. FISK.

Middlesex. January 26, 27, 1891. — November 11, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Adoption — Fraud — Probate Court — Appeal — Next of Kin — Laches — Practice — Amendment.

An appeal lies, under the Pub. Sts. c. 156, § 6, from a decision of the Probate Court dismissing a petition to revoke a decree of adoption on the ground of fraud practised on the court.

The next of kin of an adopting parent, who but for the adoption would be his heirs at law, may petition the Probate Court to annul the decree of adoption on the ground of fraud.

Laches will not be imputed to non-resident next of kin of an adopting parent, who, upon discovering after such parent's death that the decree of adoption was procured by the fraud of the adopted child, petitioned the Probate Court within a few months thereafter to revoke the decree, in the absence of anything to put them upon the inquiry earlier, or to show that the delay has operated to such child's prejudice.

A petition to the Probate Court to annul a decree of adoption, brought by the next of kin of the adopting parent, who but for the adoption would be his heirs at law, alleged that the adopting parent, being at the time of unsound mind and under the undue influence of the respondent, was induced by means of such unsoundness and the undue influence and fraud of the respondent to apply for the respondent's adoption, and to concur in the proceedings; that these facts were suppressed by the respondent and concealed from the court; and that the decree was procured by means of the fraud thus practised upon the court. *Held*, that the petition, upon the addition of an averment that such parent left property, but no valid will, would state a case calling for the interposition of the court.

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PETITION, filed on February 18, 1890, to the Probate Court, to revoke a decree of adoption. The case was heard in this court, on an appeal taken by the petitioners, before *Holmes*, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

The case was argued at the bar in January, 1891, and afterwards, in September following, was submitted on the briefs to all the judges.

J. L. Thorndike, (*W. S. Otis* with him,) for the petitioners.

G. L. Mayberry, for the respondent.

MORTON, J. This was a petition to the Probate Court of Middlesex County, by the heirs at law and next of kin of Eliza Jane Fisk, late of Waltham, to revoke and annul a decree of adoption made upon the petition of said Eliza in 1884, and assented to by the adopted person, the respondent, in which it was decreed that the respondent should thenceforward be the child to all legal intents and purposes of the petitioner, and that his name should be changed from Jasper Paine Blake to Jasper Leon Fisk. The grounds alleged in the petition were, that at the time of said alleged adoption the said Eliza was of unsound mind; that she was induced to present and concur in said petition by means of fraud and undue influence practised upon and exercised over her by the defendant; and that these facts were fraudulently concealed by him from the court. After hearing, the petition was dismissed in the Probate Court, because the allegations did not appear to be sustained. An appeal was taken to this court, and the case comes here on the question whether the ruling of the justice who heard it, that no appeal lay from the Probate Court, and that, if it did, the petition disclosed no cause of action or *locus standi* on the part of the petitioners, was correct.

There would seem to be nothing in the nature of a decree of adoption to take away the power of the Probate Court to revoke and annul it, on the ground that it had been procured by fraud practised upon the court. It is said generally in *Waters* v. *Stickney*, 12 Allen, 115, that it is impossible to deny the power of the Probate Court "to correct errors arising out of fraud or mistake in its own decrees"; and the same thing is held in substance in *Gale* v. *Nickerson*, 144 Mass. 415. There is nothing in the stat-

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utes which places a decree of adoption on any different footing in this respect from that of other judgments and decrees of that court. The respondent does not indeed contend that the Probate Court has not the power to annul for fraud a decree of adoption, like any other decree or judgment. But he insists that there is no appeal from the refusal of the Probate Court to revoke the decree of adoption in this case. The language of the statute relating to appeals from the Probate Court is very broad, and is as follows: "A person aggrieved by an order, sentence, decree, or denial of a Probate Court or of a judge of such court may, except in cases otherwise provided for, appeal therefrom to the Supreme Judicial Court." Pub. Sts. c. 156, § 6. There is nowhere any provision taking away the right of appeal from a decree of the Probate Court denying a petition to vacate and annul one of its judgments on the ground of fraud. In *Gale* v. *Nickerson*, *ubi supra*, which was a case where there was an appeal from the refusal of the Probate Court to reopen a decree allowing the will of John Nickerson, on the ground that it had been obtained by fraud, not only did the right to appeal pass without question, so far as the reported case shows, but it was expressly upheld by this court. We see nothing in the nature of a decree of adoption which should deprive parties on the one side or the other of the right to appeal from the dismissal or allowance by the Probate Court of a petition to reopen and annul it on the ground of fraud.

The respondent further insists that the petitioners have no standing in court, and no right to be heard. It is true that the next of kin of Eliza Jane Fisk could not have appealed from the decree of adoption during her lifetime. The only way in which they could have attacked it would have been to procure the appointment of a guardian, who could have taken an appeal or other proceedings in her name. Whether, in case they had petitioned for the appointment of a guardian, and the Probate Court had refused to appoint one, that would have been conclusive upon them in any subsequent proceedings, we do not now consider. The petitioners lived out of the State at the time when the adoption proceedings were instituted, and do still so reside, and were entirely ignorant, till after the death of said Eliza, of her condition and of the facts attending the adoption.

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If they cannot now be heard, there would seem to be no way in which the adoption proceedings, however fraudulent, can be reached, and the death of Eliza will have operated to clothe the respondent's fraud with immunity from attack. We do not think her death can have that result. But for the alleged adoption, the petitioners, who were the next of kin of Eliza, would have been her heirs at law. If the adoption proceedings should turn out for any reason to be invalid, they will be entitled to her estate as her heirs at law. They have, therefore, a direct pecuniary interest in the matter, like disinherited heirs in proceedings concerning their ancestor's will, or heirs whose ancestor was fraudulently induced to make a conveyance of real estate. *Holman* v. *Loynes*, 4 DeG., M. & G. 270. *Gresley* v. *Mousley*, 4 DeG. & J. 78. Kerr on Fraud and Mistake, 371.

No law required that any notice should be given to them before the decree of adoption was passed. They were not parties to the proceeding, had no opportunity to be heard, did not live in this State, and are not concluded by the decree. *Adams* v. *Adams*, *ante*, 290.

While the primary result of adoption is, like marriage, to create a different relationship and status as to the parties immediately concerned from that which existed between them before, it may also indirectly affect, then or afterwards, the rights and interests of others; and on principle there would seem to be just as much reason that parties interested should be allowed to contest the validity of a decree of adoption, as that they should be allowed to contest the validity of a divorce and a subsequent marriage by one of the divorced parties. *Adams* v. *Adams*, *ante*, 290. We are unable to perceive any sound distinction between the two cases.

The respondent further objects, that, even if the said Eliza was of unsound mind at the time of the adoption proceedings, the validity of the decree is not thereby affected, because a judgment against an insane person is neither void nor voidable. If we assume that to be so, the answer is that the case proceeds, not on the ground that the decree is to be avoided by reason of the unsoundness of mind of Eliza, but on the ground that by means of that unsoundness, and of the undue influence which he was thereby enabled to gain over her, and his suppression of

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these and other facts, the respondent was enabled to perpetrate, and did perpetrate, a fraud upon the court, which resulted in a decree of adoption which would not otherwise have been made. It is not a case where, with the facts all before it, the court came to a wrong conclusion, but a case in which by means of the fraudulent conduct and undue influence which the respondent exercised over Eliza, and which he concealed from the court, he procured the entry of the decree in controversy. *Edson* v. *Edson*, 108 Mass. 590.

The only question remaining is as to the sufficiency of the petition. It is stated upon the petitioners' brief, and not denied by the respondent, that Eliza died possessed of a large amount of real and personal estate, which she attempted to dispose of by a will which the petitioners claim to be invalid on the grounds of incapacity and undue influence. The petition contains no averments relating to these matters, as it should, but since it can be readily amended, we have considered it as if it contained sufficient allegations concerning them. The petition, as amended, sets out that said Eliza was, at the time of the alleged adoption, of unsound mind and under the undue influence of the respondent, and was induced by means of this unsoundness of mind and the undue influence and fraud of the respondent to present said petition for adoption, and concur in the proceedings; that none of these facts were made to appear to the Probate Court, but were concealed from it by the respondent; and that the decree was procured by means of the fraud thus practised upon the court. We think, taking into account the nature of the case, this sufficiently sets out that the decree was procured by the respondent by means of a fraud practised by him upon the court and upon said Eliza, and states a case calling for the interposition of the court. See *Brooke* v. *Mostyn*, 2 DeG., J. & S. 373.

We see no ground on which it can be justly claimed that the petitioners have been guilty of laches. Eliza Jane Fisk died on October 10, 1889, and the petitioners did not discover till after her death her condition at the time of the decree of adoption, or the facts concerning the respondent's conduct in relation to it. Till then there was nothing to put them upon an inquiry. Their petition was filed in February, 1890, only a few months

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after the death of Eliza. We do not think that, living out of the State as they did, they can be guilty of laches, in the absence of anything to put them upon an inquiry, in not discovering the facts between the time of the alleged adoption and her death. Besides, it does not appear that the delay has operated to the respondent's prejudice. *Pope* v. *Salamanca Oil & Refining Co.* 115 Mass. 286. *Morse* v. *Hill*, 136 Mass. 60. *Nudd* v. *Powers*, 136 Mass. 278. *Gresley* v. *Mousley*, 4 DeG. & J. 78.

For these reasons, a majority of the court are of opinion that, if the petitioners elect to amend their petition by adding in substance an averment that the said Eliza left property and left no valid will disposing of the same, then, according to the terms of the report, the case is to stand for hearing on the evidence; otherwise, the petition is to be *Dismissed.*

GEORGE H. TURNER & another *vs.* FRANCIS A. NYE.

Barnstable. March 23, 1891. — November 11, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Constitutional Law — Private Fishery.

The St. of 1889, c. 383, authorizing the flowage of lands or flats in Barnstable County, upon certain terms and conditions, for the purpose of creating or raising a pond for the culture of useful fishes, is constitutional. FIELD, C. J., dissenting.

The owner or lessee of land in Barnstable County, who flows his own lands and those of others by means of a dam built and maintained for the purpose of creating a pond for the culture of useful fishes, and who keeps such pond well stocked with trout, is within the St. of 1889, c. 283, although his sole object is to increase his own personal pleasure, profit, and advantage, and not to benefit the public.

BILL IN EQUITY, filed in the Superior Court on September 5, 1889, to prevent the defendant from maintaining a dam across a creek flowing into Cataumet Harbor in Falmouth, in the county of Barnstable, and from flowing the plaintiffs' land. Hearing before *Mason*, J., who ordered the bill to be dismissed.

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and, after an appeal had been taken by the plaintiffs to this court, made the following report of the facts.

The plaintiffs were the owners of about three fourths of an acre of marsh land adjoining the creek above referred to; and the defendant had built the dam across the creek in question, under the provisions of the St. of 1889, c. 383,* and by the license of the board of harbor and land commissioners, so as to flow about sixty acres of his own land and that of the plaintiffs, so that they were deprived of the use of it. The dam was partially constructed, and the plaintiffs' land appreciably flowed, but no substantial damage was done before the passage of that statute.

This dam was erected and is maintained for the purpose of creating and raising a pond for the culture of useful fishes, and the pond raised by the dam is well stocked with trout. The immediate purpose or intention of the defendant and those interested with him was not to perform a public service, but to engage in the culture of useful fishes for their own personal pleasure and profit, and the pleasure and profit of particular persons to whom they should sell rights to fish in the pond. It was not their purpose to supply the market with such fishes, nor to supply them to the public by any means, direct or indirect. The land of the plaintiffs had small market value for any use to which it could be applied other than that for which it is now used by means of the defendant's dam. There was at the time of the passage of the act, and is now, much land in Barnstable County similarly situated, having small market value for any

* This statute, entitled "An act to authorize the flowage of land for the purposes of fish culture," was approved on May 28, 1889, and is as follows: "Any owner or lessee of lands or flats situated in the county of Barnstable, appropriated or which he desires to appropriate to the culture of useful fishes, may erect and maintain a dam across any stream for the purpose of creating or raising a pond for such fish culture, upon the terms and conditions and subject to the regulations contained in chapter one hundred and ninety of the Public Statutes, so far as the same are properly applicable in such cases: provided, however, that nothing herein contained shall authorize the erection or maintenance of a dam across any navigable stream within said county without a license obtained therefor from the board of harbor and land commissioners, in accordance with and subject to the provisions of chapter nineteen of the Public Statutes."

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purpose to which it can be applied by its separate owners, which would be enhanced in value if it were shown by successful experiment that such land could be profitably used for the cultivation of useful fishes under the powers conferred by the act.

The case was argued at the bar in March, 1891, and afterwards, in September, was submitted on the briefs to all the judges.

A. M. Goodspeed, for the plaintiffs.

J. M. Hall, for the defendant.

MORTON, J. The plaintiffs do not rely upon the fact that the dam was partially constructed by the defendant before the passage of the St. of 1889, c. 383. The plaintiffs could not avail themselves of that fact in this suit. If the dam is maintainable under that statute, the plaintiffs would not be entitled to its abatement although it was partly erected without right. *Ware* v. *Regent's Canal Co.* 3 DeG. & J. 212. And if they are entitled to damages for the technical violation of their rights, their remedy is at law. *Washburn* v. *Miller*, 117 Mass. 376. Nor do they rely upon the point suggested by the defendant, that the operation of the act is confined, as it clearly may be, to Barnstable County. Cooley, Const. Lim. 390.

The plaintiffs contend that the St. of 1889, c. 383, under which the court found that the dam was completed and is maintained by the defendant, is unconstitutional, because, first, it purports to authorize the taking of private property for a use which is not public in its nature, and secondly, if the statute is constitutional, the defendant has not brought himself within it.

But in regard to the first point we think the plaintiffs misapprehend the constitutional provision which applies to the act in question. The statute was not an exercise on the part of the Legislature of the right of eminent domain, but was enacted under the provision which gives it power to "make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, . . . so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same." Const. Mass., Part 2, c. 1, art. 4. It is upon this provision that the mill acts have been placed finally in this State, after what appear at

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times to have been somewhat conflicting views. *Boston & Roxbury Mill Co.* v. *Newman*, 12 Pick. 467. *Murdock* v. *Stickney*, 8 Cush. 113. *Hazen* v. *Essex Co.* 12 Cush. 475. *Talbot* v. *Hudson*, 16 Gray, 417. *Lowell* v. *Boston*, 111 Mass. 454. It may be doubted whether, as new legislation, they could be sustained as an exercise of the right of eminent domain. *Murdock* v. *Stickney*, 8 Cush. 113. *Lowell* v. *Boston*, 111 Mass. 454. Cooley, Const. Lim. 534. *Jordan* v. *Woodward*, 40 Maine, 317.

Upon this provision also stand the cranberry act, so called, (St. 1866, c. 206); the act in regard to draining meadows, swamps, marshes, beaches, and low lands, with its authority to commissioners to open the floodgates of a mill, or to erect a temporary dam on the lands of another person, and assess the damages upon the proprietors (Pub. Sts. c. 189; see *Wurts* v. *Hoagland*, 114 U. S. 606); the act in regard to proprietors of wharves, general fields, and lands lying in common, with the control which it gives to a certain proportion in number and interest over the property of the rest (Pub. Sts. c. 111); and the act in regard to partition, by which one cotenant may be compelled to take money instead of land, or to give up for a time the occupation and enjoyment to another. Pub. Sts. c. 178. The mill acts, and these and other like statutes, (of which various illustrations might be given,) rest upon the principle that property may be so situated or of such a character that the absolute right of the individual owner to a certain extent must yield to or be modified by corresponding rights on the part of other owners, or by what is deemed on the whole to be for the public welfare. See *Commonwealth* v. *Tewksbury*, 11 Met. 55; *Commonwealth* v. *Alger*, 7 Cush. 53; *Denham* v. *County Commissioners*, 108 Mass. 202; *Wurtz* v. *Hoagland*, 114 U. S. 606.

The provision above quoted does not authorize the Legislature to take property from one person and give it to another, nor to take private property for public uses without compensation, nor wantonly to interfere with private rights. These are always to be carefully guarded and protected. But of necessity cases will arise where there will or may be a conflict of interests in the use or disposition of property, and questions may and will come up affecting the public welfare in regard to the use which shall or shall not be permitted of certain property.

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It is for the Legislature in such instances, under the power thus conferred upon it, and with due regard to private rights, to enact the necessary laws. It is for the public good that swamps and waste lands should be reclaimed and made productive. It is also for the public good that streams should be used to operate mills, to raise cranberries, and to cultivate useful fishes. If private rights appear to some extent to be invaded, that is inseparable from the nature of the use authorized, without which the streams could not be advantageously or profitably used, and compensation is provided for any injury that may be done. The character of the property and the resulting general good are deemed sufficient to justify the action of the Legislature.

It is doubtful, however, whether any property of the plaintiff is taken or any of his rights are invaded. The statute in question authorizes the erection and maintenance of a dam across any stream for the purpose of creating or raising a pond for the culture of useful fishes. It is to be erected "upon the terms and conditions and subject to the regulations contained in chapter one hundred and ninety of the Public Statutes so far as the same are properly applicable in such cases." The chapter referred to is what is known as the mill act. Under that it has been held that the right to erect and maintain a dam to raise water for working a mill does not give to the mill-owner any right in the land flowed, or take away any right from the landowner. The latter may embank his land and thus stop any flowage of it, or, if he chooses, he may collect of the mill-owner damages in gross or annually for the flowage. Until the landowner manifests his election to claim damages, he cannot be compelled by the mill-owner to submit his land to be flowed, and until then the only right which the mill-owner has as between himself and the landowner is to maintain his dam without liability to the landowner for damages in an action at law. While the landowner may protect his land from flowage, he cannot, of course, wantonly interfere with the right which the statute gives to the mill-owner to maintain his dam. *Williams* v. *Nelson*, 23 Pick. 141. *Murdock* v. *Stickney*, 8 Cush. 113. *Storm* v. *Manchaug Co.* 13 Allen, 10. *Paine* v. *Woods*, 108 Mass. 160. *Lowell* v. *Boston*, 111 Mass. 454. *Head* v. *Amoskeag Manuf. Co.* 113 U. S. 9.

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There would seem to be nothing in the purpose for which the right is given to erect and maintain a dam to create a pond for the culture of useful fishes that should give to the party erecting or maintaining such a dam any greater rights over the lands flowed by it than a mill-owner would have over lands flowed by the dam maintained by him. Without anything more, we should be slow to infer from a power to maintain a dam to create a pond for the culture of useful fishes any greater rights over lands flowed than from a power to maintain a dam to raise water for working a mill.

It appears from the facts found in the present case that the defendant's dam flows about sixty acres, all of which, with the exception of about three fourths of an acre belonging to the plaintiffs, is owned by the defendant. It is also found that the land of the plaintiffs was of small market value for any other use to which it could be applied, and that there is "much land in Barnstable County similarly situated, having small market value for any purpose to which it can be applied by its separate owners, which would be enhanced in value if it were shown by successful experiment that such land could be profitably used for the cultivation of useful fishes under the powers conferred by" the act in question. In view of these facts, and for the reasons above stated, we think that the claim of the plaintiffs that the act is unconstitutional cannot be maintained. We come to this conclusion the more readily, because a contrary result would oblige us, we fear, to hold, if the question were directly presented to us, that the cranberry act, under which a large and profitable industry has grown up, was also unconstitutional. Although several cases under that act have been before this court, no doubt as to its constitutionality seems to have been suggested. *Bearse* v. *Perry*, 117 Mass. 211. *Hinckley* v. *Nickerson*, 117 Mass. 213. *Blackwell* v. *Phinney*, 126 Mass. 458. *Howes* v. *Grush*, 131 Mass. 207.

The plaintiffs further contend, that, if the act is constitutional, the defendant has not brought himself within its scope, because it does not appear that any direct or positive benefit will be derived by the public from the defendant's acts, and because the dam has been erected and will be maintained by him wholly for his own personal pleasure, profit, and advantage. But the court

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has found that "the dam was erected and is maintained for the purpose of creating and raising a pond for the culture of useful fishes, and the pond raised by the dam is well stocked with trout." This finding brings the case within the exact words of the statute. It is not necessary that it should also appear that the object of the defendant was to benefit the public. The Legislature deemed the culture of useful fishes for any purpose beneficial, and passed this statute, as it did the mill acts, for the purpose of enabling a lessee or owner of lands or flats to raise a dam across a stream so as to engage in that occupation and use the stream without the liability to constant lawsuits from persons whose lands might be flowed. No doubt the defendant's object is his own personal pleasure, profit, and advantage. But if the enterprise is successful, the public will be benefited by the introduction and building up of a new and profitable industry, and lands now of little value and not available for any other use will be made valuable. We think this contention must also be overruled.

The result is that, in the opinion of a majority of the court, the decree appealed from must be *Affirmed.*

FIELD, C. J. My objections to the constitutionality of the St. of 1889, c. 383, briefly stated, are as follows. The purpose of the statute is not public. Cultivating fish for one's private use no more concerns the public than cultivating corn or other articles of food. The taking for such a purpose of the land of another by overflowing it cannot be justified as an exercise of the right of eminent domain. Notwithstanding what has been said in some of our decisions, overflowing a person's land without his consent is a taking of property while the overflow continues, and is a tort which would be enjoined unless the statutes authorized it. The mill acts were originally sustained on the ground that the erection of water mills was for the public benefit, and this was strictly true of grist-mills and saw-mills, if the public had the right to have their grain ground and their logs sawed at the mills. The acts, however, extended to mills of all kinds, in most of which the interests of the public were less direct; still, the erection of water mills, when water was the only available source of power, was always of public concern

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sufficient to justify the damming of streams, if compensation were paid to the persons whose lands were overflowed. Mill acts were in force long before the adoption of the Constitution, and it could not properly be held that it was the intention of that instrument to render them void. But the damming of the waters of a running stream, so that the lands of the upper proprietors are overflowed, is something more than the reasonable use of the water, which every proprietor is entitled to make, as it runs through his land, without paying any compensation to the upper or lower proprietors. It has never been supposed that the mill acts would be sustained if they contained no provision for compensation to the persons whose lands were flowed. As was said in *Isele* v. *Arlington Five Cents Savings Bank*, 135 Mass. 142, 144, "The right to flow water back upon the land of another is not the less an easement in its nature because such other may lawfully wall or dike against it. Such right on his part diminishes the extent of the easement, but does not alter its character." *Kenison* v. *Arlington*, 144 Mass. 456.

The statute in question cannot be sustained on the ground that it authorizes the improvement of property of different owners for the common benefit of the owners or for the public benefit, or on the ground that it authorizes the improvement of property which otherwise would be practically useless. It is not confined to useless or swampy lands, or to lands of any particular description. The constitutionality of the statute must be determined by its meaning, and not by the special facts of the present case. It is possible under the statute that any owner or lessee of lands or flats situated in Barnstable County for the purpose of making a fish pond for his own private use and pleasure, may overflow the greater part of the arable land in the county, with the buildings upon it. None of the precedents cited seem to me to go as far as the opinion of the court in this case, and I am compelled to think the statute unconstitutional.

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JOHN FAY *vs.* GUSTAVUS ELLIOTT & another.

Worcester. September 29, 1891. — November 11, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Division Fence — Unenclosed Land — Owner or Occupier.

The owner of unenclosed land, who has leased the same and does not occupy it, is not liable, under the Pub. Sts. c. 36, to the owner of adjoining land for double the expense of building a division fence and the fees of the fence viewers.

CONTRACT to recover double the expense of building a division fence and the fence viewers' fees. The case was submitted to the Superior Court on the following agreed statement of facts.

The record title to a lot of land in Bluff Street in Worcester stood in the joint name of the defendants, who were man and wife, without the knowledge or consent of the wife, who had no actual use, occupation, or ownership in the estate. The defendants' lot had not been enclosed, and was not improved by them, except that it was leased to third parties for the storing of carts and trucking material thereon. The plaintiff, who was the owner of an adjoining lot, and was improving the same by building thereon, requested the defendants to build a division fence with him at the equal expense of both, and the defendants refused. The plaintiff then called in the fence viewers, and they duly adjudged a fence necessary, and directed it to be built, and, upon the defendants' failing to carry out the order of the fence viewers, the plaintiff built the entire length of the fence.

Aldrich, J. ordered judgment for the plaintiff against the defendant husband and in favor of the wife; and the husband appealed to this court.

E. B. Glasgow, for the plaintiff.

W. A. Gile, for the husband.

MORTON, J. This is an action to recover double the expense of building a division fence and the fees of the fence viewers. The fence viewers had required the defendants to build the fence, but they did not do it, and the plaintiff built it.

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The right of the plaintiff to recover depends on the construction to be given to the statutes relative to the making and repairing of partition fences, and more especially of §§ 2, 10, and 14 of the Pub. Sts. c. 36. Section 2 provides generally that "the respective occupants of lands enclosed with fences shall, so long as both parties improve the same, keep up and maintain partition fences between their own and the next adjoining enclosures, in equal shares." This section evidently relates to enclosed lands, and its object is to secure the maintenance of fences between the respective occupants of such lands so long as they are improved. It appears from the agreed facts, that the defendants' land was not enclosed, and had not been, and was not occupied or improved by them, unless the fact that it was leased by them for the purpose of storing carts and trucking material constituted such improvement and occupation; neither does it appear that the plaintiff's land was enclosed, although it is stated that he was improving it by building thereon. It is clear, therefore, that the plaintiff cannot recover by virtue of § 2.

Section 10 provides that, "when lands belonging to two persons in severalty have been occupied in common without a partition fence between them, and one of the occupants desires to occupy his part in severalty, and the other occupant refuses or neglects" to divide the line or build a fence on his part of it when divided, the party desiring the fence may apply to the fence viewers, and, if a partition fence is required, they may divide and assign the same; and in certain contingencies the party applying may build the whole fence and recover of the other party double the expense of building the portion assigned to such party, with the fees of the fence viewers. There is no doubt that the lands belonged in this case to the plaintiff and to the defendants in severalty, and had been occupied by them in common within the meaning of the statute. But it is to be observed, that it is only in case the occupant, not the owner, refuses or neglects to divide the line, or to build a fence where the line is divided, that the right of the other party to apply to the fence viewers accrues. The owner may be the occupant, but in such a case it is his neglect or refusal as occupant, and not as owner, that enables the other party to set the law in motion. Again, it is the occupant, not the owner, who is made liable for

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double the expense of the fence and for the fees of the fence viewers. The statute distinguishes between owner and occupant. Thus, in § 12, it is provided that, if a party ceases to improve his land, or lays it open, he shall not take away any part of the partition fence, provided the owner or occupant of the adjoining enclosure will pay for it. So, in § 13, it is provided that, when land which has lain unenclosed is enclosed, the owner or occupant shall pay one half of such partition fence between it and the enclosure of any other occupant or owner. The reason for giving the occupant power to call on the fence viewers, and for making him liable, is obvious. He is the one who will be benefited usually by making and maintaining the fence. Generally he will be the owner. When the owner is not the occupant, it would be unjust to make him pay for something which may be of no advantage to him, and of which another person may reap almost all, if not quite all, the benefit.

In the present case the only evidence relied on of occupation on the part of the defendants, or either of them, was the fact that they had leased it to third persons for storing carts and trucking material. The character of the tenancy is not stated; whether at sufferance or at will, or for years or for life. But whichever it was, so long as it continued, the lessee had the right of possession and occupancy. He, and not the owner, was the occupant, and he was the one against whom the proceedings should have been instituted and this action brought.

The plaintiff contends, however, that under the provisions of § 14 the fence viewers had a general power to require the fence to be built, and to apportion the expense. But even if that were so, which we do not intimate, the jurisdiction of the fence viewers only extended to cases concerning fences "between the lands of the respective occupants," and, as we have already seen, the defendants were not the occupants of the lot belonging to them. As this is conclusive against the plaintiff's right to recover under this section, it is unnecessary to consider its scope further.

The result is, therefore, that judgment should have been entered for both defendants, and it is

So ordered.

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DANIEL W. ELLINWOOD *vs.* CITY OF WORCESTER.

Worcester. September 28, 1891. — November 12, 1891.

Present: ALLEN, HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Mechanic's Lien for Labor — Statement in Registry of Deeds.

A statement filed in the registry of deeds under the Pub. Sts. c. 191, § 6, by one claiming a mechanic's lien for labor alone under an express contract to furnish both labor and material at an entire price, is insufficient, if no attempt is made therein to give the whole number of days of labor further than to set forth, after a recital of a large portion of it in hours, that the remainder was done partly between certain dates and partly in the last part of a certain month.

PETITION, under the Pub. Sts. c. 191, to enforce a mechanic's lien. At the trial in the Superior Court, without a jury, before *Aldrich*, J., it was admitted that a sub-contract to do masonwork and furnish labor and material, entered into by the petitioner with a contractor with the defendant city to build a schoolhouse, was an entire contract for the entire price of over $13,000; and that a balance of $794.50, claimed by the petitioner for labor only, was still due him, and was less in amount than the value of the labor performed or furnished by him in carrying out his sub-contract. The only question was whether the statement filed by the petitioner in the registry of deeds respecting the labor performed by him was sufficient. This statement, after stating the nature of the contract and the entire amount due under the same, with sundry credits, and disclosing the balance due him of $794.50, contained the following:

"The sum of $5,223\frac{19}{100}$, is the worth of the labor performed and furnished, as per the schedule of items hereto annexed:

"To labor by the following men, between September 2d, 1889, and May 1st, 1890.

"Hunt, 11 hours, @ $38\frac{8}{9}$ per h. $4.27. [Here followed many similar items, amounting with the first item to $4,048.19.]

"Labor of myself, between Sept. 1st, 1889, and May 1st, 1890, 900.00

"Labor laying 1100 yds. concreting, @ 25c. pr. yard, in the last part of August, 1890, and ending August 30th, 1890, 275.00

$5,223.19"

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The petitioner asked the judge to rule that the recital in the statement, filed by the petitioner in the registry of deeds, of the item of labor performed or furnished by him, although stated in hours instead of days, was a sufficient compliance with the requirements of § 6 of the Pub. Sts. c. 191, which requires that "the number of days of labor performed or furnished, and the value of the same, shall also be stated." The judge refused so to rule, but ruled that the statement was insufficient in not giving the number of days of labor performed or furnished, and in giving the time of a portion of the labor in hours, and of another portion of the labor no item either in hours or days, and that the petitioner's lien was not established; and found for the respondent. The petitioner alleged exceptions.

M. M. Taylor, for the petitioner.

T. G. Kent, (*F. P. Goulding* with him,) for the respondent.

KNOWLTON, J. Prior to the passage of the St. of 1872, c. 318, under an entire contract to furnish both labor and materials in the erection of a building on real estate, to be paid for at an entire price, no lien attached for the labor unless a lien was also secured for the materials before furnishing them by giving notice in writing to the owner, if the owner was not the purchaser, that the contractor intended to claim a lien for materials. Pub. Sts. c. 191, § 3. *Felton* v. *Minot*, 7 Allen, 412.

The St. of 1872, c. 318, § 1, (Pub. Sts. c. 191, § 2,) provides that under such a contract a lien for the labor may be "enforced, if it can be distinctly shown what such labor was worth, but in no case shall such lien be enforced for a sum greater than the price agreed upon for the entire contract." For the protection of all persons interested in the estate, the statement to be filed in such a case must set forth, in addition to the other particulars mentioned in the preceding statutes, "the entire price for the entire contract, the number of days of labor performed or furnished, and the value of the same." St. 1872, c. 318, § 2. Pub. Sts. c. 191, § 6. The filing of a statement containing these particulars within the time prescribed is a condition precedent to the enforcement of the lien. The obvious purpose of the statute is to enable the owner and others interested in the property to ascertain from the record the particulars of the claim, and whether it is of such a kind that it can probably be enforced against the land, and if so, for what amount.

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The contract price, the number of the days of labor, and the value of the labor, are important elements entering into this question. These must be stated as required by the statute, or there is no lien. Pub. Sts. c. 191, § 8. A mere "inaccuracy in stating the amount due for labor or materials," if the result of mistake, will not defeat the lien. This was a provision of the General Statutes, and the subsequent St. of 1872, c. 318, makes new requirements in regard to the statement. This section can have no greater effect in its application to these requirements than to relieve the petitioner from the effect of mistakes in giving the number of days of labor or the value of it. It does not nullify the provision of the later statute, which requires the number of days of labor and the value of it to be given, as well as the contract price, and does not apply to a case where there is an entire omission to give them.

In *Hurley* v. *Lally*, 151 Mass. 129, it was decided that a statement under the statute which did not contain the contract price was fatally defective, and the principle which governs that case is decisive of this also. The exceptions show that all the labor and materials were furnished under an express contract, for an entire price; and, while the statement sets forth a large amount of labor by the number of hours occupied in performing it and the price per hour, it contains one item as follows: "Labor of myself between September 1, 1889, and May 1, 1890, $900," without anything to indicate the number of days for which claim is made. The next item, "Labor laying 1100 yards concreting at 25 cents per yard in the last part of August, 1890, and ending August 30, 1890, $275.00," is equally defective. There was obviously no attempt to give the whole number of days of labor done under the contract, and this non-compliance with the requirements of the statute makes it unnecessary to inquire whether the remaining part of the statement which states the time in hours alone is sufficient.

Exceptions overruled.

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ABRAM WHITE *vs.* CHARLES B. BIGELOW & others.

Suffolk. January 30, 1891. — November 16, 1891.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Oral Promise — Consideration of Marriage — Statute of Frauds — Memorandum.

A bill in equity was brought by the plaintiff, as "administrator of the estate" of his deceased wife, for his own benefit as her husband, to recover property conveyed by her while alive to the defendant for distribution at her death. The plaintiff relied on her oral promise, made to induce him to marry her, that it should at her death belong to him and his son E., and upon the unsigned fragment of a letter from her, setting forth: "All I have will be yours and E.'s when I have done with it, but I must hold it while I live. . . . Do not feel that there is any change in my feelings towards you; indeed, am more attached to you now than ever, but it is best for us to decide as we can hold out." The bill set out the fragment alone, alleging that the rest was lost. *Held*, that the ante-nuptial contract relied on was within the statute of frauds, and the written memorandum was not sufficient to satisfy the statute. *Held, also*, that if the bill was to be construed as seeking to obtain the property not only for the plaintiff's own benefit, but also as assets of his wife's estate, it was clearly bad for multifariousness.

BILL IN EQUITY, filed in this court, for the recovery of property conveyed by the plaintiff's intestate to the first named defendant. *Allen*, J. dismissed the bill; and the plaintiff appealed to the full court. The facts appear in the opinion.

The case was submitted on briefs in January, 1891, and afterwards, in June following, was submitted on the same briefs to all the judges.

M. R. Thomas, for the plaintiff.

E. W. Hutchins & H. Wheeler, for the defendants.

LATHROP, J. The plaintiff brings this bill, "as he is administrator of the estate" of his deceased wife, for his own benefit as her husband, and alleges that, before their marriage, "she, for the purpose of inducing him to marry her, informed him of the amount and value of her estate, and promised and agreed with him that, if he would marry her, he should thereupon and thereby be the owner of all of her said estate, with the privilege on her part of retaining the management and possession of the same for and during her natural life, for his and her benefit, and

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the benefit of his son Eugene"; and that he, in consideration thereof, did marry her, but that she, in violation of her agreement, with intent to deprive him of said property, and to evade and violate the laws of the Commonwealth, made a certain indenture, a copy of which is annexed to the bill.

By the indenture, which is dated February 5, 1889, twenty-one days before her death, Sarah E. White conveyed to the defendant Bigelow certain personal property, in trust, to apply so much of the income and principal as he should see fit for her support during her life, and, on her decease, to pay her debts, and distribute the balance among the other defendants, in various amounts, as stated in the indenture.

The bill further alleges, that, in confirmation of her offer, conversation, and agreement, she wrote and signed a letter to the plaintiff, "a part of which is as follows, the remainder of said letter containing the signature having been lost": "We talked last fall. You will remember what I said about my income. All I have will be yours and Eugene's when I have done with it, but I must hold it while I live, I will do what I said in regard to business, the loan we have talked of, etc. I will go to Townsend Thursday if you wish. Please write Tuesday so that I can receive it in season. Thursday unless it actually storms, if cloudy will go. Do not feel that there is any change in my feelings towards you; indeed, am more attached to you now than ever, but it is best for us to decide as we can hold out."

The bill contains other allegations which the plaintiff contends amount to a charge of fraud and undue influence on the part of the defendants in obtaining the indenture from Sarah E. White.

The bill then alleges that the plaintiff never, at any time, assented to the execution of the indenture, or to the disposition of said estate, or any part thereof, but as administrator of said intestate's estate he has demanded the same from the defendant Bigelow, and Bigelow has refused to give it up.

The prayer of the bill is that the indenture may be decreed to be void, and that the defendants may be ordered to deliver to the plaintiff any of the estate of the intestate in their possession or control, held or claimed to be held by them under said indenture.

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A general demurrer was filed to the bill, and, after the bill had been twice amended, so as to read substantially as above set forth, the demurrer was sustained, and, the plaintiff stating that he had no further amendment to offer, the bill was dismissed, with costs, and the plaintiff appealed.

Although the bill states that it is brought by the plaintiff, "as he is administrator of the estate" of his wife, it alleges that it is brought for his own benefit as her husband. It seems to us, therefore, that the plaintiff does not seek to recover the property alleged to have been conveyed by the indenture as assets of the estate of his intestate, but for his own benefit, by virtue of the alleged ante-nuptial agreement.

This agreement is alleged to have been made in consideration of marriage. The statute of frauds requires the agreement, or some note or memorandum of it, to be in writing, and signed by the party to be charged. Pub. Sts. c. 78, § 1, cl. 3. *Chase* v. *Fitz*, 132 Mass. 359. *Peck* v. *Vandemark*, 99 N. Y. 29. To satisfy the statute, the agreement or memorandum must, either by its own terms or by reference to some other writing, express with reasonable certainty all the conditions and essential elements of the bargain. See *Freeland* v. *Ritz*, *ante*, 257, and cases cited.

The plaintiff here relies upon an oral agreement, and upon a fragment of a letter. No action can be maintained upon the oral agreement unless the letter is a sufficient memorandum of it. But the fragment set forth is not the letter, but only a portion of it. Although the rest of the letter is alleged to have been lost, the entire contents, or the substance thereof, should be set out, that the court may see what the promise was, if any, that the intestate made.

Considering the fragment of the letter by itself, the words, "All I have will be yours and Eugene's when I have done with it, but I must hold it while I live," is the expression of an intention to give the property to the plaintiff in the future, rather than an agreement binding upon her and her estate. *Maunsell* v. *White*, 4 H. L. Cas. 1039. *Caton* v. *Caton*, L. R. 2 H. L. 127. *Maddison* v. *Alderson*, 8 App. Cas. 467. The words at the end of the fragment, "it is best for us to decide as we can hold out," also tend to show that no specific agreement was made.

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In the view we have taken of the scope of the bill, it is entirely immaterial whether the defendants obtained the conveyance from the wife by fraud and undue influence or not, and we need not consider the allegations of the bill in this particular.

The allegation that his wife executed the indenture to evade and violate the laws of the Commonwealth is, for the same reason, immaterial; and it may be added that the plaintiff has not in his brief pointed out any law which he contends has been violated.

If the bill can be construed as seeking to obtain the property not only for the plaintiff's own benefit, but also as assets of his wife's estate, it is clearly bad for multifariousness.

Decree affirmed.

SARAH O. THURSTON, petitioner.

Norfolk. November 10, 1891. — November 18, 1891.

Present: ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Trust — Voluntary Settlement — Termination of Trust.

If a married woman, in order to place her property beyond her husband's interference or control, voluntarily conveys it, without reserving any power of revocation, to a trustee to hold in trust for her during life, and upon her death according to her appointment by will, and, failing such appointment, for her issue, her children have a beneficial interest in the trust fund, and she is not entitled, without such children's consent, after obtaining a divorce from her husband, to have the trust terminated.

PETITION, filed in the Superior Court, for the termination of a trust. The case was heard by *Barker*, J., and was as follows.

The petitioner, who was formerly the wife of one Billings, for the purpose of placing her property beyond the interference or control of her husband, purchased from her own earnings a lot of land, and had it conveyed by the grantor to a trustee to hold in trust, without any power to revoke the same reserved in the trust deed, for her for her life, and upon her death as she might by will appoint, "and in default of such appointment to the issue of said Sarah O. Billings, by right of representation,

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equal shares, and if she shall die without having exercised her power of appointment herein reserved to her, and without leaving issue then surviving, then unto the heirs of her the said Sarah O. Billings." Since the execution of the trust deed, the petitioner has been divorced from her former husband, and has married one Thurston, and the purposes for which the trust was created no longer exist. By her first marriage she had three children, all of whom were minors at the date of the hearing. The trustee, who had converted the land into money, gave his assent to the petition. The judge dismissed the petition, on the ground "that other children of the petitioner may be born, who, in default of appointment by her last will and testament, would, with any other of her issue, take the trust fund upon her decease, and that her children now living are minors, and have no power to make assent to the prayer of said petition upon which the court can act"; and the petitioner appealed.

J. J. Feely, for the petitioner.

LATHROP, J. The general rule in this Commonwealth undoubtedly is that a voluntary settlement, which is completely executed, with no power of revocation reserved, cannot be revoked or set aside, except upon proof of mental incapacity, mistake, fraud, or undue influence. *Hildreth* v. *Eliot*, 8 Pick. 293. *Viney* v. *Abbott*, 109 Mass. 300. *Sewall* v. *Roberts*, 115 Mass. 262.

Where, however, "the whole objects and purposes of the trust have been accomplished, the interests created under it have all vested, the parties request it, and the trustee consents," a court of equity may decree the determination of the trust. Hoar, J., in *Bowditch* v. *Andrew*, 8 Allen, 339. See also *Smith* v. *Harrington*, 4 Allen, 566; *Inches* v. *Hill*, 106 Mass. 575; *Stone, petitioner*, 138 Mass. 476; *Gannon* v. *Ruffin*, 151 Mass. 204.

The case at bar falls within the rule, and not within the exception. The children of the petitioner have a beneficial interest in the trust fund, and they have not assented to the termination of the trust.

The petitioner contends that, where no motive exists for not inserting a power of revocation, the absence of such power is *prima facie* evidence of a mistake. But if she had retained such a power it would have defeated the object of the settlement, which was, as she alleges, to place the property beyond the

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interference or control of her then husband. *Keyes* v. *Carleton*, 141 Mass. 45.

The decree of the justice of the Superior Court dismissing the bill must be *Affirmed.*

COMMONWEALTH *vs.* JOHN S. HUGHES.

Plymouth. November 11, 1891. — November 18, 1891.

Present: ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Intoxicating Liquors — Common Nuisance — Evidence for Jury.

At the trial of an indictment on the Pub. Sts. c. 101, §§ 6, 7, for keeping a common nuisance, to wit, a tenement used for the illegal sale and keeping of intoxicating liquors, there was evidence that the defendant had a bottling establishment at the place in question, and was also an expressman; that a keg such as beer came in had been found on the premises; that cases of empty bottles were unloaded from his team there, and were replaced by what seemed to be full bottles, and deliveries made therefrom, especially in the night-time; that the driver had been seen to deliver a case of lager beer at a house near by; and that the defendant had said that the beer delivered by him was bottled in another town. *Held*, that the evidence was sufficient to warrant a conviction.

INDICTMENT, upon the Pub. Sts. c. 101, §§ 6, 7, for keeping and maintaining a common nuisance, to wit, a tenement in Brockton, used for the illegal keeping and illegal sale of intoxicating liquors from January 1, 1891, to June 8, 1891. At the trial in the Superior Court, before *Aldrich*, J., the testimony for the government, as given by several police officers, was that the defendant's place of business, being the tenement in question, was situated at the corner of Lincoln Street and Railroad Avenue in Brockton, and part of it was fitted up as a bottling establishment; that the defendant was also an expressman; that one of the officers visited the defendant's place in January, 1891, and told the defendant that he came there to see how the defendant obeyed the law; and the defendant told him that he tried to live up to the law, and that he had been bottling lager beer and ale, but would stop; that the defendant said he run an express to Randolph, and what beer he delivered in Brockton was bottled in Randolph; that the defendant's team had been seen at the place in

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question, and cases of empty bottles unloaded therefrom, and what appeared to be cases of full bottles loaded thereon; that the team had been followed, and the driver seen to deliver a case of lager beer at a house a short distance from the defendant's place; that one of the officers, upon visiting the defendant's place in May, 1891, saw a keg similar to those used for beer upon the premises; that upon several occasions in the night-time the defendant's team was unloaded at the place in question, and again loaded with cases filled with bottles, and the driver seen to deliver therefrom several cases; and that the defendant's team frequented the freight-house in Brockton a good deal.

The judge refused to rule, as requested by the defendant, that upon the evidence the defendant could not be convicted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

H. H. Chase & F. M. Bixby, for the defendant.

A. E. Pillsbury, Attorney General, & *G. C. Travis*, First Assistant Attorney General, for the Commonwealth.

PER CURIAM. The evidence was proper for the consideration of the jury, and was sufficient to warrant a verdict of guilty. *Commonwealth* v. *Burke*, 114 Mass. 261, 263. *Commonwealth* v. *Intoxicating Liquors*, 116 Mass. 24. *Commonwealth* v. *McCluskey*, 123 Mass. 401.

ELLEN A. HENDRICKEN *vs.* SAMUEL MEADOWS.

Suffolk. November 13, 1891. — November 18, 1891.

Present: ALLEN, KNOWLTON, MORTON, & LATHROP, JJ.

Personal Injuries — Pitfall — Negligence — Due Care.

In an action of tort, for personal injuries occasioned to a girl by stepping into an open register hole in the floor of the defendant's store, it appeared that the grating had been temporarily removed, and the defendant had instructed a clerk to warn persons entering the store to look out for the hole; that the plaintiff, a customer, called at the store and walked through the same with her eyes fixed upon the contents of a showcase, and fell into the hole and was injured; and that the store was well lighted, and, if she had looked to see where she was going, the accident would not have happened. The evidence was conflicting

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on the question whether any warning was given to her, and whether she saw the hole before the accident. *Held*, that there was evidence sufficient to warrant the jury in finding that the plaintiff was in the exercise of due care, and that the defendant was negligent.

TORT, for personal injuries occasioned to the plaintiff, a girl between eighteen and nineteen years of age, by stepping into an open register hole in the defendant's store.

At the trial in the Superior Court, before *Hammond*, J., there was evidence that the register hole was in the floor of the store, and was about eighteen inches in diameter; that this hole ordinarily was closed by an iron grating, and was nearly opposite and about a foot in front of the end of a showcase about ten feet long, and at the end of the store farthest from the entrance door; that on the morning of the accident the grating had been removed for the purpose of cleaning it, and was returned to its place in about twenty minutes; that meanwhile the plaintiff called at the store twice; that in the showcase nearly opposite the hole were certain articles which the plaintiff at her first visit looked at and asked the price of from a clerk; that the store was well lighted, and the register hole was in the line of any person entering at the door by which the plaintiff entered, and could easily be seen by persons entering the store; and that the defendant had directed a clerk to warn all persons entering the store to look out for the hole. The defendant and the clerk both testified that the clerk seasonably warned all persons, including the plaintiff, to look out for the hole. The clerk testified that he warned the plaintiff on the occasion of her first visit to beware of the hole, and that the plaintiff then looked at it. The plaintiff testified that she did not hear the clerk's warning or see the hole, and that a warning given her by the clerk at the time of her second visit came too late to prevent her from stepping into the hole; that at her second visit she entered the store, placed her hand on the showcase, and so walked up the store, looking at the articles in the showcase, and that her attention was wholly given to them; that she did not look in front of her to see where she was going, and that if she had so looked the accident would not have happened.

The defendant asked the judge to rule that the plaintiff's action could not be maintained on the evidence; but the judge

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refused so to rule, and submitted the case to the jury, with instructions to which no exception was taken.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

H. F. Buswell, for the defendant.

J. R. Murphy, for the plaintiff, was not called upon.

LATHROP, J. The only questions which have been argued by the defendant in this case are whether there was sufficient evidence to warrant the jury in finding due care on the part of the plaintiff, and also negligence on the part of the defendant.

We are of opinion that there was evidence for the jury on both of these points. The evidence was conflicting on the questions whether any warning was given to the plaintiff, and whether she saw the hole before the accident. Although it appears that she might have seen the hole if she had looked on the floor, and had not had her eyes fixed upon the articles in the showcase which she desired to purchase, yet we cannot say, as matter of law, that such conduct on her part amounted to a want of due care. Whether a woman who, while in a shop where she has no reason to apprehend danger, keeps her eyes fixed upon articles which are put on exhibition to attract purchasers, rather than upon the floor in search of pitfalls, uses the ordinary caution and vigilance which persons of reasonable prudence would be expected to use under like circumstances, is a question of fact for the jury, and not of law for the court.

If no warning was given, the evidence was abundant to warrant the jury in finding that the defendant was guilty of negligence. Although there was evidence that the defendant's clerk warned the plaintiff, she testified that she did not hear the warning. The defendant contends that this is not sufficient evidence that the warning was not given. But the plaintiff could not, by her own testimony, contradict the defendant's evidence in any other way. The jury might well have been of the opinion that, under the circumstances, if any warning was given, it must have been heard; and, if they believed the plaintiff, have found that, as the warning was not heard, it was not given.

Exceptions overruled.

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SUPPLEMENT.

Opinion of the Justices to the Governor and Council.

Under the Pub. Sts. c. 70, § 2, relating to the appointment of pilot commissioners for Boston Harbor, the Governor and Council can appoint such commissioners without the recommendation of the trustees of the Boston Marine Society only when such trustees fail seasonably to make a recommendation.

A commissioner of pilots for Boston Harbor is an officer appointed by the Governor and Council within the meaning of the St. of 1887, c. 364, relating to tenure of office, although he must first be recommended by the trustees of the Boston Marine Society if the trustees are able and willing to make the recommendation, and will continue to hold the office after the term for which he was originally appointed has expired until his successor in office has been duly appointed and qualified.

The following order was passed by the Governor and Council on December 16, 1891, and transmitted to the Justices of the Supreme Judicial Court, who, on December 31, 1891, returned the answer which is subjoined.

Whereas, a question has arisen before the Governor and Council as to the legality of the appointment of a commissioner of pilots for the harbor of Boston, made in July, 1890, and to the duty of the Governor and Council now to make an appointment to said office, which they have been formally requested to do by the Boston Marine Society in this Commonwealth, a copy of which is annexed; under which circumstances certain important questions of law arise, hereto subjoined, of which an early determination is desirable; it is therefore

Ordered, That the opinion of the Honorable Justices of the Supreme Judicial Court be, and it is hereby, requested as to the law arising upon the following facts.

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Under the Public Statutes, chapter 70, section 2, commissioners of pilots for the harbor of Boston are to be appointed by the Governor and Council, "and shall first be recommended by the trustees of the Boston Marine Society," unless they "refuse, decline, or are unable to make the recommendation." A rule adopted by the Executive Council for the regulation of its proceedings, and existing in July, 1890, provides that no nomination shall be acted on by the Council until seven days after it shall have been made; and another rule then existing provides that said rule may be suspended by vote of five members at a regular meeting.

The term of office of Thomas P. Howes, a commissioner of pilots for the harbor of Boston, expired by limitation on July 13, 1890. On the 8th day of said July the trustees of the Boston Marine Society duly recommended for said office of commissioner of pilots (and forwarded such recommendation on the same day) to the Governor and Council, Edwin D. Wadsworth of Milton; and they did not and have not recommended any other person for the successor of said Howes in such office.

On July 1, 1890, the Governor nominated said Howes for the said term, which would begin on the 14th of July, 1890, and at the next meeting of the Council, on the 8th day of said July, the nomination of said Howes was confirmed, the Governor and Council at that time not knowing of the recommendation of said trustees. Said Howes has continued to perform the duties of the office to the present time. The Governor and Council are advised that it is doubtful if the legality of said appointment can be determined by proceedings or information in the nature of *quo warranto*.

And the questions here presented are: —

First. Was Thomas P. Howes, on the above facts, legally appointed in July, 1890, commissioner of pilots for the term beginning July 14, 1890?

Second. Does chapter 364 of the Acts of 1887, relating to certain officers, apply to the pilot commissioners for the harbor of Boston, and if so, with what effect in the case stated?

The copy of the request by the Boston Marine Society, referred to in the order and annexed thereto, was as follows:

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"Boston Marine Society, Boston, July 20th, 1891.

"To His Excellency the Governor. Dear Sir: On the 13th day of July, 1890, the term (of three years) of the office of pilot commissioner for the harbor of Boston, which had been held by Thomas P. Howes, expired. On the 8th day of the same month (four days before the expiration of said term), the trustees of the Boston Marine Society, pursuant to section 2, chapter 70, of the Public Statutes, duly forwarded to his Excellency the Governor their recommendation of Captain Edwin D. Wadsworth of Milton, for appointment to said office to succeed said Howes; and said trustees have not recommended any other person therefor. They are advised that no person has been legally appointed thereto, and, except as its duties may be performed by said Howes holding over, the office is now vacant.

"They respectfully ask that their said recommendation may be acted upon, and that said Edwin D. Wadsworth may be appointed to said office.

"Very respectfully yours,
"Luther Fisk, President,
John Humphrey, Secretary, of the
Boston Marine Society."

To His Excellency the Governor and the Honorable Council of the Commonwealth of Massachusetts:

We, the Justices of the Supreme Judicial Court, have considered the questions upon which our opinion was required by an order of the Governor and Council, a copy of which is annexed, and respectfully submit the following opinion: —

The meaning of the Pub. Sts. c. 70, § 2, seems to us to be that the persons to be appointed commissioners of pilots for the harbor of Boston by the Governor, with the advice and consent of the Council, must first be recommended by the trustees of the Boston Marine Society, and that the Governor and Council can appoint said commissioners without such recommendation only when the trustees refuse, decline, or are unable to make a recommendation. It appears that the trustees actually recommended to the Governor and Council the appointment of Mr. Edwin D. Wadsworth for the term of three years from the expiration of the term of office of Mr. Thomas P. Howes; that

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this recommendation was made and sent to the Governor and Council on the eighth day of July, 1890, and that the term of office of Mr. Howes did not expire by limitation until the thirteenth day of said July. We understand that this recommendation of Mr. Wadsworth by the trustees is still before the Governor and Council; that the trustees have never withdrawn it; and that they still ask that it may be acted on.

We are of opinion that the recommendation of Mr. Wadsworth by the trustees was seasonably made; and that the Governor and Council were not authorized to reappoint Mr. Howes under the circumstances stated in the order.

We are also of opinion that the St. of 1887, c. 364, applies to the office of commissioner of pilots for the harbor of Boston. The commissioners are officers appointed by the Governor with the advice and consent of the Council, although they must first be recommended by the trustees of the Boston Marine Society, if the trustees are able and willing to make the recommendation.

We therefore answer the first question in the negative; and the first part of the second question in the affirmative. The effect of the St. of 1887, c. 364, is that Mr. Howes continues to hold the office the term of which expired by limitation on July 13, 1890, until his successor in office has been duly appointed and qualified.

WALBRIDGE A. FIELD.
CHARLES ALLEN.
OLIVER WENDELL HOLMES, JR.
MARCUS P. KNOWLTON.
JAMES M. MORTON.
JOHN LATHROP.
JAMES M. BARKER.

Boston, December 31, 1891.

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THE Honorable WILLIAM ALLEN, a Justice of this Court from the fifth day of September, 1881, died at his residence in Northampton on the fourth day of June, 1891. A meeting of the members of the Hampshire Bar was held in Northampton on the twelfth day of September, 1891, at which resolutions were passed, which were presented to the full Court at Greenfield on the fifteenth day of the same month. Before presenting them, William P. Strickland, Esq., addressed the Court as follows:

May it please your Honors: We are here this day in the shadow of a great sorrow and of a great loss. Our eyes grow dim as we look upon this Court and remember that one form endeared to us by the associations of years will be seen here no more, — that one voice is hushed in that silence which we call death.

Mr. Justice William Allen has passed through the valley of the shadow of death, but "the true Light, which lighteth every man that cometh into the world," illumines the pathway of the just from the sepulchre into the opening heavens, and we are comforted. His long, laborious, and useful life on earth is ended, but his work remains; the spirit of his life survives, and the coming years will but serve to increase his reputation, and to demonstrate the worth of his character and the permanent value of his judicial labors.

Judge Allen was an able lawyer and an accomplished jurist; a man of sound learning, of clear and vigorous intellect, of breadth and flexibility of view, of strong sensibilities under firm control, having that refinement and delicacy of feeling which find their natural expression in the silent and pervasive influence of the daily life. The calmness of his demeanor and the winning grace of his speech were indicative of the serenity of his mind and of the gentleness of his nature, but he had a royal will, and maintained its righteous supremacy. Those who knew him in his public life cherished for him a reverent admiration, and those who were admitted to his intimacy realized the depth and tenderness of his friendship.

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I cannot forget the circumstances under which I last saw Judge Allen. It was a casual meeting on a city street; his face was radiant with the hope of returning health, and radiant with an unspoken affection. There was the utterance of a few kindly words and the unconscious pathos of a last farewell.

There remained for him a few days of preparation for active work, — a night of weariness and of quiet endurance, — and in the early morning of a summer day, in his own home, with his loved ones near, he fell asleep, and awaked to find himself forevermore at home.

"It is not death to die,
To leave this weary road,
And 'mid the brotherhood on high
To be at home with God."

In behalf of the Hampshire Bar, I present these resolutions, with the request that they may be entered upon the records of the Court.

Mr. Strickland then presented the following resolutions:

The members of the Hampshire Bar, deeply conscious of the loss sustained by this State in the death of the Honorable William Allen, late an Associate Justice of the Supreme Judicial Court, desire to express their appreciation of his services and worth.

Resolved, That in the practice of his profession at the Hampshire Bar with associates who were masters of the law and leaders of men, by his native powers, by severe study, by a chivalric devotion to his profession, by an affectionate regard for his brethren, and by a rare fidelity to the courts and to his clients, he secured and easily maintained a prominence which assured his future success and his enlarged usefulness.

Resolved, That as a Justice of the Superior Court his practical sagacity, quick insight, minute and varied knowledge, and aptitude in the application of principles, were called into constant exercise, and illustrated the extent and variety of his powers.

Resolved, That as a Justice of the Supreme Judicial Court

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he exhibited the qualities of an accomplished jurist. He possessed a clear and calm mind, and the objects of his thought were sharply outlined and defined. He had a scientific knowledge of the law, and saw its principles grouped in their right relations. He grasped the essentials and escaped the confusion of legal speculation. He was critical in his perceptions, and gifted with subtlety of discernment and with analytic skill. He severely scrutinized facts, and assigned to each its place. He had the habit of patient investigation, and pursued his investigations to fixed and ultimate results, and in the conscientious discharge of duty he spared not himself. He was patient of opposition, but firm in his beliefs, self-reliant, and conscious of the resources which were ever at his command. He listened to counsel with a sincere and unfailing courtesy. His familiarity with logical reasoning and his mental energy enabled him to reach conclusions without display and without waste of power.

In his written opinions legal propositions were distinctly enunciated, and their applications to the facts of an individual case were stated with severe simplicity. The precision of his thought and the felicity of his language settled the law, and neither invited nor permitted further controversy.

The purity of his character, the elevation of his thought, the sweet seriousness of his disposition, his benignity and grace of manner, and the delicacy of his sympathy, gave a peculiar charm and fascination to his personal presence, and partially revealed the strength and depth of his hidden life, — the spiritual life of one "dwelling in the secret place of the most High, and abiding under the shadow of the Almighty."

Resolved, That we express our heartfelt gratitude that this memorable life has been so long spared, that its work so faithfully done is imperishable, and that its spirit survives for our instruction and for our inspiration.

John C. Hammond, Esq., then addressed the Court as follows:

May it please your Honors: Recurring occasions like this remind us that, though we love to pause and render a tribute to the dead, we are almost like soldiers, — under orders to close up the ranks and move on. But at this hour we can pause and

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allow ourselves the sad though highly prized privilege of memorial words.

We who count ourselves as still in the vigor of life turn with brief but loving words to the character of Judge William Allen, whose life so suddenly closed. I first knew him when he was in the full practice of his profession at the Hampshire Bar, in 1868. He has outlived all the men who then bore the burden of active work at that Bar. He was the last survivor of the five lawyers then, and for years before, prominently identified with the practice of the law in that county, — William Allen, Samuel T. Spaulding, Charles Delano, Edward Dickinson, and Ithamar F. Conkey. The last two had other duties, and were less often seen in the court-room than were Allen, Spaulding, and Delano, who were active in all the cases then before the courts. Each of the five a man of dignity and culture; each possessed characteristics peculiarly his own; each gave to every cause force, originality, and vigor, presenting to us, who were then learners, a high ideal of the profession to which as students and beginners we aspired.

I recall the remarkable force of Lawyer William Allen's addresses to the jury. Under and through a quiet manner there appeared a vigor of thought, a force of illustration, and a persuasiveness truly eloquent. Again I recall him as he sat in his office when some message or business from another office took me there. The genial courtesy of the kindly gentleman quickly removed all sense of being a stranger, and made me feel that he was ready to count beginners among his friends. It made an impression so pleasant, it was an influence so helpful, that I cannot refrain from its mention to-day.

Through all the contests of the court-room he remained the fast friend of his brethren at the bar. When he left his practice and assumed the duties of the judicial office, we who best knew him knew as a certainty that a man well fitted had been selected.

His gentleness of manner connected itself with a decision and force fully appreciated by those who heard him address a jury, and equally appreciated as we have seen him in his work in the higher places to which he was called.

Only a few days before his death, two of us were before him

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on a brief errand at his house, and after the errand was done he held us in pleasant conversation for nearly an hour upon current events of the city of his home, showing his great and unabated interest in all things of interest to Northampton, though he was able to mingle little in its affairs. The next word which came to us was of his sudden death. The whole community in which he lived mourned for her most honored citizen. May we take counsel of this life. May we so live that we may be thus beloved.

Chester C. Conant, Esq., then addressed the Court as follows:

May it please your Honors: In behalf of my brethren of the Franklin County Bar, I rise to second the resolutions offered by Mr. Strickland for the Hampshire County Bar. They are fitting and eloquent, and we concur in the sentiments so gracefully expressed.

This county was once a part of old Hampshire, and the courts of the two counties have ever had more intimate relations, and closer connections, I suppose, than other counties in the Commonwealth.

Judge William Allen was often here in important trials as a practitioner before he was promoted to the bench. His power as a lawyer before the court and jury was well known, and often felt by some of us. In his contests we always felt that he was ever fair and honorable; and however hard the blows he dealt, we all knew there never was any sting of bitterness in them. It is one of the happy features of our noble profession, that in the course of exciting trials we can deal and receive sharp and vigorous strokes in such an impersonal manner that no wounds are left after the fierce contest is over.

As a trial judge in the Superior Court, we call to mind to-day his uniform courtesy in the trial of causes; he could rule adversely with firmness, and even graciously. His sound common sense and great sagacity in the practical affairs of life, combined with profound knowledge of law and unbending integrity and kindness of heart, made him always a welcome judge in this county. He was held in the highest respect and reverence, and is to-day most sincerely mourned by those who knew him best.

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Judge Allen was happy in his ancestry. As I have stood before the faithful portrait of President Eleazer Wheelock, in the Dartmouth College portrait gallery, it has seemed to me that I could trace a marked resemblance between the lineaments of Judge Allen and the face of that wonderfully able man, who, one hundred and twenty-five years ago, in an unbroken wilderness laid deep and strong the foundations of that honored institution which has been such a power for good in New England. The abundant gray hair and beard of Judge Allen emphasized his resemblance to President Wheelock, as the latter is painted in the full-bottomed wig of those times. The likeness is remarkable. It seems to me that, as in features, so we can trace the resemblance in mind and heart. President Wheelock was a great man, — so full of practical sagacity in the common affairs of life, so wise and good, so fertile in expedients, and so successful in the accomplishment of his great undertakings. In Judge Allen we find repeated in full vigor these characteristics of the honored President of Dartmouth.

It might have been expected that the lineal descendant of such men as Eleazer Wheelock of Dartmouth, and President Allen of Bowdoin, would be distinguished, but it was Judge Allen's rare good fortune to exceed even such expectations.

The Attorney General then addressed the court as follows:

Your Honors: I willingly avail myself of the invitation of my brethren of the bar of this circuit to add my testimony to the worth and value of Judge Allen's character and public service. I am confident that the bar of that part of the Commonwealth in which I live would not desire me to sit by without some expression of the feeling which they fully share with his neighbors and friends of the western counties.

From a memorandum which has been put into my hand, I learn that Judge Allen was born at Brunswick, Maine, in 1822, and that at the age of sixteen he entered Bowdoin College, of which his father was then President, but completed his course at Amherst, graduating there in 1842. Three years later he was admitted to the bar in Northampton, and there he practised law for twenty-seven years. This brief statement seems to embody his history to the time of his appointment to the bench.

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He was of an ancestry which pointed to great things, — son of a President of Bowdoin, grandson through his mother of a President of Dartmouth, and grandson through his father of Thomas Allen, the "fighting parson" of Bennington fame. But while he was called to many honorable positions of private trust, he never engaged in public affairs or held a public office until he was appointed a Judge of the Superior Court, in 1872. He was raised from that position to the bench of this Court in 1881, and here remained until his death, June 4, 1891, which terminated a period of judicial service longer than the average of these times, and long enough to win for him a high place in the public esteem.

He was a stranger to us in the East when he came upon the bench, but coming from that part of the Commonwealth which at one time within our memory was represented in this Court by Chapman, Colt, and Wells, we naturally expected much of him. I do not need to say how the anticipation was fulfilled. He had qualities which instantly commended him to the favor of the bar. Though not courtly, he was courteous, and he was a listener whom nothing seemed to tire. But I think it was not until his elevation to this Court that the whole breadth and power of his mind were displayed, in his written opinions, of some of which it is not too much to say, that in clearness of statement and close and consecutive reasoning they approach the highest level of the Court.

We were unable to see much of Judge Allen in private life, but we learned in time that beneath his impassive exterior the social virtues flowed in a full and abundant stream. I cannot forbear to allude to his striking presence. The picture of that tranquil face and figure, snow-crowned and venerable, like a patriarch or prophet on a canvas of Raphael, is before us as we speak of him, and it will not soon be forgotten. And as he was distinguished from common men in appearance, so was he in character. Quiet and unassuming, but inflexible in his convictions and "heedless of praise or blame" in the discharge of duty, he worthily paid to the community the debt of public service and private example, and he leaves to his friends and associates the memory of one above whose grave may be truly written, *Integer vitæ scelerisque purus.*

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Mr. Justice Holmes responded as follows:

Gentlemen of the Bar: When I heard the sudden news of our associate's death, my second thought was that the Commonwealth had lost a judge not to be replaced, — my first was that I had lost a friend.

The Judges of this Court are thrown so much and so closely together by their work, that they are intimate with one another perforce; and to be intimate with William Allen was necessarily to love and admire him. The bar found him very silent upon the bench. He was not so in the consultation-room. There he expressed himself freely, and at times, notwithstanding his quiet manner, with the warmth of a hearty and somewhat impulsive temperament, so that there was no question that we knew not only his opinions, but the man behind them.

He seemed to me a typical New Englander, both in character and in ways of thinking; a characteristic product of one of those inland towns which have been our glory, — centres large enough to have a society and a culture of their own, and, formerly at least, remote enough to have local traditions, and local rather than cosmopolitan standards and responsibilities. As with others whom I have known that were brought up in similar surroundings, his Yankee caution and sound judgment were leavened with a touch of enthusiasm capable of becoming radical at moments, and his cultivation had destroyed rather than fostered his respect for the old merely as such. He was very kind. He was always perfectly considerate and reasonable, as well as warm of feeling. In ill health as in good, he took his share of work without a word or hint of what it cost him until he died. He had the subtlety of a Calvinist theologian, and as sound a training in the common law as was to be found in Massachusetts; but he was saved from becoming over technical by his good sense, his humanitarian turn, and the occasional slight touch of radicalism which I have noted. I never felt quite sure that nothing had been overlooked in a statement of facts, until his eye had scrutinized it. In discussion, if you did not agree with him, you always reached an exact issue, and escape in generalities was impossible. I know few qualities which seem to me more desirable in a judge of a court of last resort than this accuracy of thought, and the habit of keeping one's

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eye on the things for which words stand. Many men, especially as they grow older, resent attempts to push analysis beyond consecrated phrases, or to formulate anew. Such attempts disturb the intellectual rest for which we long. Our ideal is repose, perhaps because our destiny is effort, just as the eye sees green after gazing at the sun. Judge Allen had none of this weakness, but went on without rest to the end.

Great places make great men. The electric current of large affairs turns even common mould to diamond, and traditions of ancient honor impart something of their dignity to those who inherit them. No man of any loftiness of soul could be long a Justice of this Court without rising to his full height. But our dead brother seemed to me too modest to be ambitious for reputation, and to regard his place mainly as an opportunity and a duty. He would have been most pleased, too, I dare say, to slip from it and from life, when his hour came, without remark. He would have preferred not to be celebrated with guns and bells and pealing requiems, the flutter of flags and gleam of steel in the streets, and all the pomp which properly is spent on those who have held power in their right hand; which necessarily and rightly was spent on another honored and beloved member of this bench, who had added a soldier's to a jurist's career. I too am content for him that it should be so, if this neglect of outward show means, even for a chosen few, that their eyes have taken a wider sweep, and have seen that such symbols do not express the vast and shadowy command which a thinker holds. Our prevailing ideals are somewhat coarse. Comparatively few imaginations are educated to aspire beyond money and the immediate forms of power. I have no doubt that vulgar conceptions of life at the top are one of the causes of discontent at the bottom of society. Unless we are to accept decadence as the necessary end of civilization, we should be grateful to all men like William Allen, whose ambition, if it can be called so, looks only to remote and mediated command; who do not ask to say to any one, Go, and he goeth, so long as in truthful imagination they wield, according to their degree, that most subtile and intoxicating authority which controls the future from within by shaping the thoughts and speech of a later time.

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Such men are to be honored, not by regiments moving with high heads to martial music, but by a few others, lonely as themselves, walking apart in meditative silence, and dreaming in their turn the dream of spiritual reign.

The resolutions of the Bar were ordered to be entered upon the records of the Court; and the Court then adjourned.

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